FILED

94 694 OCT 18 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ROBERT B. BURKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it violates due process and equal protection for the trial judge in a criminal case to suppress and exclude critical exculpatory evidence offered by the defendant on the basis that Rule 801(d)(2)(E) of the Federal Rules of Evidence only allows declarations of coconspirators to be used by the prosecution and that excluding extrinsic proof of a critical inconsistent statement of a prosecution witness would save time.

2. Whether a defendant in a criminal case based on accomplice testimony is entitled to a jury instruction that evidence of a good reputation for being peaceful and nonviolent standing alone can create a reasonable doubt.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
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ROBERT B. BURKE,
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v.

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PETITION FOR Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert B. Burke prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit was filed July 20, 1994, and is contained in Appendix A of this Petition.

JURISDICTION

The July 20, 1994, judgment of the United States Court of Appeals for the Third Circuit (Appendix A) affirmed

petitioner Robert B. Burke's judgment of criminal conviction dated December 1, 1993 (Appendix B). The mandate was stayed by the Third Circuit on August 17, 1994 and the stay was continued by orders dated September 9, 1994 and September 14, 1994 (Appendix C). The mandate ultimately issued on September 20, 1994 (Appendix D). This Court's jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides in pertinent part:

> (d) A statement is not hearsay if- . . .

> (2) Admission by party opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to issue to the United States Court of Appeals for the Third Circuit for review of the federal criminal conviction of former attorney Robert B. Burke. Jurisdiction of the Court of Appeals was by virtue of 28 U.S.C. § 1291 and jurisdiction of the United States District Court for the Eastern District of Pennsylvania was predicated on 18 U.S.C. § 3231[1].

On May 12, 1992, Robert B. Burke was indicted by a federal grand jury in the Eastern District of Pennsylvania and charged with racketeering (Count I, 18 U.S.C. §§ 1961 and 1962 (c)); arson (Count II, 18 U.S.C. § 844(i)); conspiracy to murder federal witnesses (Count III, 18 U.S.C. § 371); murdering a federal witness (Count IV, 18 U.S.C. § 1512(a)(1)(A)); and use of interstate commerce facilities in the commission of murder for hire (Count V, 18 U.S.C. § 1958(a)). In August of 1993, a jury convicted Burke of all of the above charges and on December 1, 1993 he was sentenced to life imprisonment for Counts I, IV and V, a ten-year term for Count II, and a five-year term for Count III. In addition, he was fined $25,000 and ordered to pay $250.00 in special assessments.

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[1]Page references proceeded by the designation "N.T." are to the original notes of trial testimony for the designated date. Page references followed by a small "a" are to the appendix filed with the Third Circuit on the direct appeal. Materials enclosed in the appendix to this petition are referred to by the specific page designation of Appendix A through F, and also reference the original notes of testimony and/or the Court of Appeals record designation.

Robert B. Burke (hereinafter "Burke") was an attorney who specialized in representing clients with personal injuries. In the late 1980's he entered into a scheme with two Philadelphia area doctors, Robert Segin and Frank DeLia, to defraud insurance companies by submitting false and inflated bills for extensive psychotherapeutic and medical treatment. On March 6, 1990, a client of Burke's who participated in this scheme, Donna Willard, was murdered approximately one week after being served with a federal grand jury subpoena relating to an ongoing fraud investigation of the activities of attorney Burke and doctors Segin and DeLia. In May of 1990 Burke was arrested pursuant to a preindictment complaint charging mail fraud and ordered detained at the request of the prosecution based on suspicion of his possible involvement in the murder of federal witness Donna Willard. The murder investigation continued.[2]

By December of 1990, the murder investigation had developed John Foley (hereinafter "Foley") as a government informant/witness. Foley admitted that he had been approached by James David Louie (hereinafter "Louie") to locate a hit man to kill Donna Willard and that he (Foley) had subsequently contacted a criminal associate named Javier Lebron (hereinafter "Lebron") who accepted the "contract" and eventually murdered Donna Willard. Foley could not provide any evidence to the investigators that Louie was acting on orders from, or even with the knowledge of Burke, the undisputed target of the investigation, so the investigators carefully planned and orchestrated two covert and surreptitious telephone calls between Foley and Louie. Foley was instructed to tell Louie that the hit man, Lebron, wanted to sell

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[2]Burke has been incarcerated since his arrest in May of 1990. In July of 1990 he and eleven other co-defendants were charged in a 106 count mail fraud indictment. He entered a guilty plea to these charges in August of 1990 and was sentenced to five years imprisonment on January 10, 1991.

the Donna Willard murder weapon to buy heroin, and by this ruse draw Louie into a conversation where he would admit that Burke was involved in the murder of Donna Willard and discuss ongoing plans to murder yet other potential witnesses. The resulting telephone conversations were taped by Special Agents of the Federal Bureau of Investigation with Foley's consent, but without Louie's knowledge and may be summarized as follows:[3]

On December 15, 1990, Foley talked to Louie about various criminal activities including an ongoing insurance fraud scheme involving the burning of automobiles, the cover story that the hit man in the Willard murder was on drugs; the need to get the murder weapon from the hit man (Lebron) so it didn't fall into the hands of authorities; Louie's refusal to cooperate with authorities[4]; and the fact that Foley and Louie would not be apprehended for the Willard murder because the authorities would not deal with the hit man, Lebron. Insofar as Burke's involvement in the Willard murder is concerned, Louie specifically stated that Burke did not know anything about the murder. This was affirmed by Louie several times during the conversation, with Louie stating emphatically that there was no connection between Burke and the Willard murder and, accordingly, Foley had no involvement with Burke to be concerned about.[5]

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[3]The transcripts of these conversations were provided to the District Court for review in passing on the admissibility of the tapes and are included as Appendix E to this brief. References to significant sections of these transcripts will be designated by a page number followed by an "E" (_____ E).

[4]Louie was originally indicted in the fraud scheme and entered into a plea agreement, but never told the investigators about the other planned murders during his "cooperation" with authorities under this initial plea agreement. Accordingly, Louie's credibility was extremely questionable.

[5]See 25E-26E, 33E-34E, 37E.

On December 19, 1990, FBI agents again caused Foley to contact Louie, this time in a reorchestrated attempt to establish through Louie that it was Burke who was providing the money for the additional murders that Louie was arranging. During this call, Lebron's willingness to commit additional murders for Louie was discussed and confirmed; the additional murder victims were identified as "the Doctor, Cimino, Simone, Rose and the guys over in Collingswood" and Louie revealed that these murders are being paid for not by Burke, but by other unnamed people. Louie specifically stated that "Bob (Burke) didn't come up with the money" for the Willard murder and that "somebody different is coming up with the money" for the new murders.[6] It is clear that these additional murders were still being planned by Louie, even though by this time Burke had been arrested, pled guilty and was awaiting sentencing for his part in the fraud scheme.

On May 12, 1992, Robert B. Burke was charged, in part, with conspiring with "James David Louie, Dale Thompson, John Foley, and Javier Lebron, a/k/a "J," and others unknown to the grand jury, to murder federal witnesses . . . Donna Willard . . . Patrick Conway . . . Dr. Robert Segin . . . Anthony Cimino . . . Thomas Saltzgueber and William Rose."[7] As was developed at trial, the government's case against Burke was dependent upon the testimony of one cooperating government witness, James David Louie and statements made by Louie to others admitted by the court as declarations of a coconspirator during the course of a conspiracy.

After being arrested and confronted with the admissions of his guilt contained on the two FBI tapes, Louie

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[6]See 50E, 63E-64E. The money for the new murders was allegedly coming from unnamed people in the state of Virginia. See 9F.

[7]Count III of the indictment of May 12, 1992.

completely changed his story and told authorities that Burke was the mastermind behind the Willard murder, that Burke gave him orders on the other murders he was planning with Foley, and that Burke was the person who was going to pay for all the murders that were being planned.

At Burke's trial, the District Court allowed Louie to be questioned on direct examination by the prosecutor as to whether he told Foley or the hit man (Lebron), about Burke's involvement and Louie stated that he saw "no need to go into details," "no reason to tell Mr. J"., "Bob told me . . . he does not want to meet the gunman," and he (Louie) was "blowing smoke" by giving false information to Foley. On cross-examination, Louie indicated that he was fearful of Burke "being angry" if he told Foley of Burke's involvement and acknowledged that he never told Foley and Lebron about Burke's involvement, but again referred to it as "blowing smoke" because he was afraid of Burke.[8]

Since the critical issue at this trial was the believability of Louie's testimony, the defense attempted to play the two taped conversations between Foley and Louie. The prosecutor successfully objected to any playing of the FBI recorded conversations and ultimately to any examination of Foley concerning what Louie had told him concerning Burke's involvement. Accordingly, Louie's "blowing smoke" testimony was the only evidence allowed on this issue. The defense offered numerous arguments for allowing the tapes and Foley's testimony into evidence including: the fundamental unfairness of excluding such probative exculpatory testimony, the impeachment of Louie's trial testimony and the use of the

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[8]These quoted references are the basis for the Third Circuit's conclusion that the exclusion of the tapes and refusal to allow Foley to be cross-examined were harmless. See appendix A at page 9A. The relevant portions of Louie's testimony quoted and relied upon in the Third Circuit's opinion are contained in Appendix F to this Petition at 1F through 20F.

evidence as substantive evidence under Rule 801(d)(2)(E) as trustworthy coconspirator statements impeaching other coconspirator statements already used by the prosecution. The District Court excluded the tapes and Foley's testimony on the basis that Louie's statements did not qualify under the Federal Rules of Evidence as statements of a coconspirator; that the statements were not admissible for impeachment purposes since Louie admitted that he did not tell Foley or Lebron about Burke's involvement (the extrinsic evidence rule) and, implicitly, that fundamental fairness did not require the disputed evidence to be placed before the jury. The District Court did not allow the tapes to be played during the trial and sustained objections to numerous questions directed to Foley by defense counsel aimed at developing the fact that Louie affirmatively told Foley that Burke was not involved in, and did not pay for, the murder of Donna Willard.[9]

The defense in this case presented evidence in the form of eight witnesses who testified to Burke's reputation in the community for being peaceful and nonviolent[10] and the defendant Burke testified, denying his involvement in the murders. There was also evidence to support a finding that Louie acted independently in arranging the Willard murder. John Foley testified that Louie had told him that Willard was the "Queen of the Fraternal Order of Police," that he (Louie) had dated Willard and "gone out with her for a long time," that she was a"flapping her mouth too much" and that "she could really hurt a lot of people because she was making a deal with the feds to help her brother-in-law with his (jail) time."[11] The argument that Louie acted on his own in

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[9]N.T. 8/23/93, pp. 37-39, 846-848a: N.T. 8/23/93, pp. 55-57, 864-866a. N.T. 8/23/93, pp. 58-59, 867-869a.

[10]N.T. 8/23/93, pp. 26-35.

[11]N.T. 8/23/93, pp. 69-74, 878-883a.

murdering Donna Willard was strengthened by the fact that Louie had discussed with a coconspirator named Dale Thompson murdering Robert Burke.[12]

This was not a one-sided case, but rather, a case which called upon the jury to resolve sharp factual disputes by determining the credibility of witnesses, particularly the credibility of Louie, the government's chief witness.[13]

Defendant Burke requested the District Court to instruct the jury that the reputation evidence that he had presented for being peaceful and nonviolent could establish a reasonable doubt. The District Court denied this instruction and charged the jury as follows:

> Now, you also heard from a number of witnesses who talked about the defendant's reputation for being peaceful and nonviolent. You have heard testimony the defendant, Robert Burke, has a good reputation for being peaceful and nonviolent in the community where he lives and works.
>
> Along with all the other evidence that you have heard, you may take into consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the

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[12]Thompson admitted telling Louie that if there was no lawyer (Burke) there would be no case. N.T. 8/12/93, pp. 61-62, 259-260a.

[13]The only direct evidence of Burke's guilt other than Louie's testimony was an alleged admission made to another prisoner immediately after Burke's arrest on the pre-indictment complaint in May of 1990. This is the lowest possible grade of evidence and was denied by Burke during his testimony. The government theory was that Burke's arrest and concomitant withdrawal from medication resulted in Burke temporarily lowering his guard and making the admissions to a total stranger.

> government has proved beyond a reasonable doubt that the defendant committed the crime. (N.T. 8/25/93, pp. 138-139, 1209-1210a).

The defendant took exception to this portion of the District Court's jury instructions.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeal's Decision Affirming the District Court's Suppression of the Exculpatory and Impeaching Statements of the Prosecution's Chief Witness, James David Louie, Conflicts with Applicable Decisions of this Court Interpreting the Due Process Clause, Exacerbates a Conflict in the Courts of Appeals on the Proper Use of Impeaching Evidence, Interprets Rule 801(d)(2)(E) of the Federal Rules of Evidence in a Manner Which Offends Equal Protection and Presents an Important Question of Federal Law That Should Be Promptly Settled by this Court.

A. The Court of Appeal's Decision Conflicts with Applicable Decisions of this Court.

This Court has long recognized that the "right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045 (1973). The Third Circuit's holding in this case conflicts with the principles announced twenty years ago in the *Chambers* case.

In *Chambers*, the defendant was permitted to call a witness named McDonald and introduce his signed, written confession to the murder for which the defendant was charg

ed. The defendant was barred from going further and effectively cross-examining McDonald or producing three witnesses he had orally confessed to because of evidentiary rules existing in the State of Mississippi. This Court reversed Chamber's conviction as being fundamentally unfair and violative of the due process clause.

In the case *sub judice,* defendant Burke was barred from introducing the two government generated tape recorded conversations in which Louie exculpated Burke and placed the responsibility for the murder on others, thereby forcing the jury to accept Louie's self-serving explanations as to why he denied Burke's involvement to Louie's criminal associates. Louie's explanations were so watered down and weaseled that they came out as favorable prosecution evidence that Burke was hiding his involvement and that Burke was so dangerous he made admitted murderers such as Louie fearful. Likewise, because of the District Court's restrictive interpretation of the Federal Rules of Evidence, Burke was not allowed to present the best evidence of what Louie said and how, *i.e.*, the FBI tapes. Indeed, it would be important for the jury to hear tone of voice, inflection, manner of speaking and other voice demeanor traits, *i.e.*, the advantage of actually hearing Louie's words captured on tape. Moreover, Burke was not even permitted to question Foley (the witness Louie actually made the statements to) about Louie's denial of Burke's involvement - the critical issue in this case.

We respectfully submit that while there may be slight factual differences between this case and *Chambers*, the affront to the integrity of the fact-finding process and fundamental fairness here is equal to, if not greater than, that found by this Court in *Chambers* and that the Third Circuit's attempt to distinguish *Chambers* does not withstand analysis.

The Court of Appeals held that the evidence in the *Chambers* case had persuasive indicia of trustworthiness which

are not present in this case. This is not so. First, the two tapes at issue were made by the FBI in an attempt to gather incriminating evidence against Burke in the highly emotional atmosphere which existed in the aftermath of the Donna Willard murder. Second, the actual statements contained on the two tapes were irrefutably made by Louie and tape recorded so that they were in no way dependent on accomplice credibility or even human recollection. Third, the statements on the tapes have all the standard indicia of trustworthiness found in two traditional and established exceptions to the hearsay rule - declarations against penal interest and declarations of coconspirators. Fourth, the statements on the tapes were made prior to Louie being apprehended or even accused and, hence, are more reliable than the post-arrest statements implicating Burke which were made at a time when offers of lenity were being sought from the authorities. Contrary to the Court of Appeal's opinion, these indicia of reliability, while somewhat different from those cited in *Chambers*, were adequate to trigger due process considerations and required the tapes and Foley's testimony to be admitted as substantive evidence upon proper request from the defense.

The Court of Appeals also stated that this case was distinguishable because Louie was subject to cross-examination by Burke's counsel. During direct examination by the prosecutor, Louie colored his testimony in an attempt to explain away his "failure to mention" Burke to either Foley or Lebron and on cross-examination it was obvious that Louie was prepared to go even further and talk about his "fear of Burke" as being a motivating factor that caused him to "blow smoke" at Foley and Lebron. Obviously, since the FBI tapes were never played for the jury and Foley was forbidden to testify about Louie's absolute denials of Burke's involvement, the defense and jury were virtually forced to accept Louie's self-serving explanations and weasel words. The fact that Louie was subject to cross-examination simply does not change the due process analysis. What occurred would be

analogous to the witness McDonald in the *Chambers* case being called by the prosecution, explaining that he confessed to the murder in that case because he had been promised "he would not go to jail and would share in a sizable tort recovery," 410 U.S. at 291, 93 S. Ct. at 1044, invoking during cross-examination his fear of defendant Chamber's propensity to commit violent acts, and the court then suppressing McDonald's written confession. The affront to due process arises from the suppression of critical exculpatory evidence and that is clearly what occurred in this case. The direct and cross-examination of Louie was not an adequate or appropriate substitute for the actual tapes being played and Foley's sworn and uninhibited testimony.

The jury had a unique opportunity to actually hear a coconspirator who had appeared in front of them as a witness discuss his crime as it was ongoing, to evaluate his demeanor as reflected on the FBI generated tapes and to hear the testimony of the other participant in the conversation, Foley. This opportunity should not have been taken away by the government's objections which were clearly based on a fear of the probity and quality of this exculpatory evidence. Nothing that the District Court allowed during the examination of Louie made up for the fact that critical defense evidence which would have aided the jury in determining when Louie lied (on the witness stand or during his conversations with Foley) was suppressed and excluded from the jury's consideration. This was essentially the same affront to due process that this Court found twenty years ago in the *Chambers* case.

The Court of Appeal's decision also conflicts with *Gordon v. United States*, 344 U.S. 414, 73 S. Ct. 369 (1953) - a case that was cited by the Court of Appeals for the proposition that due process fundamental fairness required, at a minimum, that the critical exculpatory evidence contained on FBI tapes be presented to the jury for impeachment

purposes.[14] *Gordon* clearly establishes that the exclusion of critical extrinsic evidence, even when offered for impeachment purposes, offends due process and fundamental fairness. The Third Circuit simply failed to follow the *Gordon* case, and in so doing, not only failed to follow a controlling decision of this court, but exacerbated a conflict in the Courts of Appeals.[15]

The issue in *Gordon* was the production and use of the main government witness' prior written statements after the witness testified that these statements did not implicate the defendant Gordon. This Court had no difficulty ordering the statements produced, quoting Judge Cooley's observation that "the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." 344 U.S. at 419, 73 S. Ct. at 373. This Court then rejected the government's contention that since the witness admitted to the contradiction between his prior written statements and his trial testimony, extrinsic evidence of the written statements was not admissible and the conviction need not be reversed stating:

> We think that an admission that a contradiction is contained in a writing should not bar admis-

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[14]The Third Circuit did not distinguish the *Gordon* case in its decision, but merely cited it as a *"see also"* case when discussing the split in the Courts of Appeals on the admissibility of extrinsic evidence.

[15]The split in the circuits is on the application of the extrinsic evidence rule in a context not implicating a simultaneous due process violation. *Compare United States v. Lashmett*, 965 F.2d 179, 182 (7th Cir. 1992) *and Williams v. United States*, 403 F.2d 175, 179 (D.C. Cir. 1968) *with Bankatlantic v. Blythe Eastman Paine Webber, Inc.*, 995 F.2d 1467, 1476 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 966 (1993) *and United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987) *and United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986).

> sion of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. Traditional rules of admissibility prevent opening the door to document which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had.

344 U.S. at 420-21, 73 S. Ct. at 374. (Emphasis supplied, footnote omitted.)

This holding has never been more appropriate than today where video and audio tape allows a jury to observe an event while it is actually occurring and work a quantum enhancement of a juror's ability to determine the facts of a particular case. Could it reasonably be contended that the infamous Rodney King assault tapes could be suppressed because the arresting officers testified about their use of reasonable force?

Not only does the Third Circuit's decision in this case fail to follow the *Gordon* case, this failure takes on added

importance in determining whether to issue the Writ of Certiorari because the extrinsic proof rule has been criticized and rejected by virtually every major treatise on federal evidence. For example, *Wigmore* has categorized the rule as "unfair"[16] while other learned treatises have called the remaining visages of the extrinsic evidence rule "nonsense."[17] The *Gordon* case shows that the level of condemnation of this academically discredited rule takes on constitutional propor-

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[16]Wigmore puts this issue into focus by stating "Even where the witness admits having made the other statement, this does not prevent the opponent from offering in evidence by his own witnesses, for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode of proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 613[04] at 613-24 n.19 (1993) *Quoting* 3 WIGMORE EVIDENCE § 1037 at 723 (3d Ed. 1940).

[17]In Louisell and Muleler, FEDERAL EVIDENCE, § 358 page 564 (1977) the authors are extremely critical of the authorities who consider an extrinsic statement inadmissible specifically calling the rule "nonsense":

> Some federal authority, both prior and subsequent to the enactment of the Rules, holds that extrinsic evidence of a prior inconsistent statement by a witness is admissible only if the witness denies the statement or fails to remember it. In other words, extrinsic proof is considered inadmissible if the witness admits the statement. This mechanical rule makes little sense: A party should be allowed to make his case by the most convincing evidence he can obtain, subject always to the power of the court to curtail needless introduction of cumulative evidence, and extrinsic proof of a prior statement will often be far more convincing than the acknowledgement of the declarant, and not cumulative. Since Rule 613(b) provides to the attacking party the option of proving the prior inconsistent statement of a witness before according the witness an opportunity to explain or deny it, it would be nonsense to continue to observe this mechanical rule and better-reasoned authorities have abandoned it. (Emphasis supplied, footnotes omitted.)

tions where the suppressed extrinsic evidence is critical exculpatory defense evidence. This case takes *Gordon* a step further because the evidence suppressed by the court was contemporaneously recorded.

The only justification for the extrinsic evidence rule ever articulated by any modern court is that it could result in a savings of time - a justification that clearly did not apply *sub judice* since this case involves critical impeaching evidence of the main government witness, who clearly was evasive on direct and cross-examination insofar as the scope and significance of his taped statements were concerned. Moreover, the record shows that the tapes were short in length, were to the point and would take little time to play, while representing significant evidence on the most critical issue to be decided by the jury, Louie's believability.[18]

The alternate conclusion of the Court of Appeals that any error was harmless is simply preposterous. This was a hotly contested case with defendant Burke's credibility pitted against the testimony of Louie. Louie's testimonial admissions that he never told Foley or Lebron about Burke's involvement were lukewarm, self-serving weasel words which were justified by Louie and the government on the basis that he was merely "blowing smoke." Had the jury heard the actual tapes containing Louie's full exculpatory emphatic denials of Burke's involvement and his assertion that others were financing the murders then being planned, the result in this case easily could have been different. In fact, that is precisely why the government so strenuously objected to this evidence. Under these circumstances, the suppression of the

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[18]The transcripts of the tapes were turned over to the Judge to assist him on ruling on this matter. Those transcripts were included in the appendix filed with Burke's direct appeal (45A-102A) and are Appendix E to this Petition.

tapes for impeachment purposes offended due process and was not harmless error.

The murder of Donna Willard was an horrendous crime and the investigative response was, as it should have been, to mobilize every available resource that could be brought to bear against those having any suspected involvement. The nature of this offense can also strain judicial temperament and the precepts of our constitution can be overshadowed by an understandable desire to identify and punish those responsible. It is exactly in this type of case that those precepts must be identified, reaffirmed and adhered to, not so much for the defendant Burke's benefit, but for our own benefit.[19] It is respectfully submitted that this is one of the primary missions of this Court and its power to issue the Writ of Certiorari. This is a worthy case for the exercise of that power.

The resolution of the split in the Circuit's on the use of extrinsic evidence and the reestablishment of the due process principles announced in the *Chambers* and *Gordon* cases merit the granting of the Writ of Certiorari in this case.

B. The Court of Appeal's Decision That Declarations of Coconspirators Can Only Be Used When They

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[19]It has been properly said:

> [a]n avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty, he establishes a precedent that will reach to himself.

T. Paine, *Dissertation on First Principles of Government, in Common Sense and Other Political Writings, Thomas Paine* 174 (W.F. Adkins ed. 1953) (1776).

Are Offered By the Prosecution To Prove Guilt Offends Equal Protection.

The District Court ruled that under Rule 801(d)(2)(E) of the Federal Rules of Evidence (hereafter "Rule 801 (d)(2)(E)") a declaration of a coconspirator can never be used by a defendant in a criminal case unless the defendant can show that the statement was "offered against a party and is . . . by a conspirator of a party." Rule 801(d)(2)(E). The Court of Appeals relied on *United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir.), *cert. denied*, 475 U.S. 1024, 106 S. Ct. 1220 (1986). This holding is tantamount to barring defense use of exculpatory declarations of coconspirators except in the most bizarre and unimaginable circumstances. For example, in this case the predicate to admission of Louie's exculpatory statements would be that Louie be found to be a coconspirator with the United States, a finding which our research indicates has never been made in a reported case.[20] The Third Circuit also rejected the argument that equal protection is violated if "a hearsay rule applies differently to the prosecution and the defense in a criminal case" as "inapplicable" because Louie had not been "a coconspirator or agent of the government when he made the statements in question." Accordingly, the Court of Appeals interpreted Rule 801(d)(2)(E) as allowing the prosecution to use declarations of coconspirators, while simultaneously barring the defense from using the identical type and class of evidence. A Writ of Certiorari should issue to the Third Circuit because this is an important question of federal law which should be promptly settled by this Court.

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[20]The District Court ruled as follows:

> "[T]he conspiracy must involve the declarant, who is Louie, and the non-offering party which is the Government. Wow, obviously there's no conspiracy between them. They're trying to tape him." (N.T. 8/20/93, pp. 177-178, 817-818a).

In this case, the government used Louie's coconspirator declarations to obtain a conviction, and objected successfully to the admission of more credible (tape recorded) exculpatory declarations of the same alleged coconspirator.[21] These excluded exculpatory statements clearly arose out of the same conspiracy charged in the indictment.[22] The Third Circuit's interpretation of Rule 801(d)(2)(E) so as to require the exclusion of these exculpatory declarations offends the equal protection clause.[23]

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[21]Louie's co-conspirator declarations can be found throughout the direct testimony of Dale Thompson (N.T. 8/12/93, pp. 2-33) and the prosecutor specifically relied on *Bourjaily v. United States*, 483 U.S. 1717, 107 S. Ct. 2775 (1987) to introduce co-conspirator declarations of Foley during Louie's direct testimony (N.T. 8/17/93 pp. 45-46, 337-338a). The coconspirator declarations that Louie made to Thompson were to the effect that Burke wanted Louie and Thompson to find and kill Doctor Segin. Thompson supposedly would be paid with free legal services from Burke, but when Thompson attempted to have Burke represent his son in a criminal matter, Burke refused because Burke had a part time job as a police officer in the venue where this criminal problem arose. (N.T. 8/12/93, pp. 27-29).

[22]Count III of the indictment in this case charged a conspiracy to murder various federal witnesses between March, 1990 and May, 1990 but it is clear from the taped conversations that the conspiracy was not over when the tapes were made in December of 1990, that the murders of the witnesses named in the conspiracy count were still being planned, that the purchase of the Willard murder weapon from the hit man was still being considered as part of the Willard prong of this conspiracy and, most importantly, that the surreptitiously recorded conversations were obviously planned and executed by the FBI in such a manner as to allow their admission under Rule 801(d)(2)(E) as co-conspirator declarations "during the course and in furtherance of the (charged) conspiracy," if statements inculpatory of Burke were made by Louie.

[23]The Fourteenth Amendment's equal protection clause expressly applies only to a "state" but this Court has repeatedly held that the Fifth Amendment's due process clause contains an equal protection component which is legally indistinguishable from that of the Fourteenth Amendment.

The Third Circuit specifically rejected the equal protection argument urged by the defendant and contained in Professor Imwinkelried's article, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269 (1986). The basis for the Third Circuit's position was that the exculpatory statements would be admissible under a strict reading of Rule 801(d)(2)(E) only "[i]f Louie had been a coconspirator or agent of the government when he made the statements in question." This was a reaffirmance of the Third Circuit's opinion in *United States v. Kapp, supra* and a substantial expansion of the *Kapp* construction of Rule 801(d)(2)(E) that declarations of coconspirators can only be used by the prosecution and never by the defense because in *Kapp* the evidence at issue was only a minor and cumulative element of the defense case.[24] Moreover, while Professor Imwinkelreid's article specifically deals with the suppression of a government agent's statement under *United States v. Santos*,

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Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1228 n.2 (1975).

[24]At the very beginning of its analysis in this case, the Third Circuit cited and reaffirmed the *Kapp* case and then went on to reject Professor Imwinkelried's equal protection analysis. In Kapp, a tape recording between a government informant (Gillium) and defendant Kapp was excluded at the trial of defendant Briggs. A close reading of the case (including Judge Sloviter's dissent) shows that Kapp was allowed to testify at Briggs' trial that "Briggs did not know the truck was stolen", 781 F.2d at 1017. Accordingly, the tape was only a minor and cumulative element of the defense case. In this case, the evidence on the tapes was effectively suppressed, Foley was barred from testifying about what was said, and Louie, who denied his tape recorded statements were true, was allowed to elaborate on his explanations of "blowing smoke" *ad nauseam* while the government relied on similar (but less trustworthy) declarations as evidence of defendant Burke's guilt. Accordingly, this case is a substantial expansion of the Kapp holding.

372 F.2d 177 (2d Cir. 1967), referred to as the *Santos* rule,[25] the analysis specifically cited the Third Circuit's *Kapp* case as being the trigger that would invoke the equal protection analysis of Rule 801(d)(2)(E). The article specifically states:

> The Federal Rules of Evidence are a statute enacted by Congress. . . . Rule 801(d)(2)(E) codifies the coconspirator doctrine, and some federal courts have read the *Santos* rule into Rules 801(d)(2)(C)-(D) as well. *See United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir.), *cert. denied,* 106 S. Ct. 1220 (1986). So construed, the Federal Rules themselves classify government agents' statements differently than coconspirators' statements. In any jurisdiction adopting this interpretation of the Rules, there is a statutory classification amenable to equal protection analysis.

71 MINN. L. REV. at 283 n.84. (Emphasis supplied.)

We respectfully submit that the citation to the article dealing with the *Santos* rule is appropriate and, the Third Circuit's *Kapp* case is the very holding which the author viewed as invoking equal protection analysis of Rule 801. The article's ultimate conclusion that the *Santos* rule would be found deficient under equal protection scrutiny is entirely valid when applied to the facts of this case.

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[25]In *United States v. Santos*, *supra*, the Second Circuit excluded the sworn affidavit of a narcotics officer offered by the defense as an admission against the government. Professor Irving Younger, who had been appointed defense counsel for the defendant, critically analyzed the holding in *Sovereign Admissions: A comment on United States v. Santos*, 43 N.Y.U. L. Rev. 108 (1968).

In fact, an equal protection violation is much clearer in this case than in a case simply relying on the *Santos* rule to exclude a government agent's statement because, here, the Court is scrutinizing a case where the prosecution actually used Rule 801(d)(2)(E) declarations of Louie to support conviction, then turned around and successfully excluded and suppressed more trustworthy exculpatory declarations of the very same coconspirator when they were offered by the defense. All of what is said in Professor Imwinkelried's article concerning the *Santos* rule violating equal protection precepts is magnified many fold in a case such as this one where the issue really becomes whether the defense can use similar declarations to give the fact finder the whole picture of a coconspirator's statements which were previously introduced by the prosecution. The admissibility of evidence simply cannot turn on the identity of the proponent, particularly when the favored proponent is the prosecution in a criminal case. Under these facts, there can be no doubt that the Third Circuit's interpretation of Rule 801(d)(2)(E) which bars the defense from explaining and impeaching the prosecution's coconspirator declarations impinges on the established fundamental right of a defendant to present a defense[26] and to present critical, reliable exculpatory evidence.[27] In fact, it is hard to imagine any state interest that could be advanced on behalf of such an unfair and unreasonable classification[28] other than the illegitimate interest rejected in *Gordon v. United States,* 344 U.S. at 419, 73 S. Ct. at 373, *i.e.*, "the state has no interest in interposing any obstacle to the disclosure of the

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[26]*In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499 (1948).

[27]*Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 (1967) and *Chambers v. Mississippi*, *supra*.

[28]*See Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974). (the defense's interest in developing all relevant facts at trial is paramount to preserving the anonymity of juvenile offenders.)

facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

In addition to its offense to the constitutional guarantee of equal protection, the present case also violated defendant Burke's Sixth Amendment right of confrontation. This Court has already decided numerous cases establishing Sixth Amendment confrontation rights that are applicable in the present circumstances. For example, a statute which interfered with the right to impeach a prosecution witness with his juvenile record was struck down as violating Sixth Amendment confrontation rights in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974). *See also Chambers v. Mississippi, supra.* Moreover, a state rule rendering accomplices incompetent as defense witnesses was struck down as violating that Sixth Amendment right to compulsory process in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967). Both of these Sixth Amendment cases have direct application here where statutory and judicial interpretations are acting in tandem to exclude critical exculpatory defense evidence. These Sixth Amendment cases represents a separate and independent rationale to issue the Writ of Certiorari in this case.

In addition to the unconstitutional application of Rule 801(d)(2)(E) there are profound and important practical implications arising from the Third Circuit's decision which call for prompt review and correction by this Court. The federal law relating to conspiracy is one of the most controversial areas of criminal jurisprudence, with the hearsay exception of Rule 801(d)(2)(E) being the area most frequently questioned, criticized and reproved.[29] The case *sub judice*

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[29]*See e.g.* FEDERAL RULE OF EVIDENCE 801(d)(2)(E) and *The Confrontation Clause: Closing this Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1332 (1985); Davenport, *The Confrontation Clause and the Coconspirator Exception in Criminal Prosecutions; A Functional Analysis*, 85 HARV. L. REV. 1378,

adds a new dimension to this issue by tilting the scales unabashedly in favor of the government and allowing the suppression of reliable, trustworthy and critical defense evidence and/or impeaching material. This suppression and exclusion of exculpatory evidence occurred under circumstances where the government used the same grade and class of evidence to actually support the defendant's conviction. The rulings approved by the Third Circuit were a frontal assault on fundamental fairness and should not be further developed or encouraged, but rather, should be promptly disapproved by this Court lest silence be misconstrued as acquiescence. The incorporation and expansion of the *Santos* rule into Rule 801(d)(2)(E) should be identified and rejected as a violation of due process, equal protection, various sixth amendment rights and the fair and common sense rules announced by this Court decades ago in the *Gordon* and *Chambers* cases.

II

The Third Circuit's Decision That the Jury Did Not Have to Be Instructed That Evidence of Good Reputation May Be Sufficient to Create a Reasonable Doubt Is in Conflict with the Decisions of Other Courts of Appeals and This Court.

The defendant requested that the trial judge instruct the jury that the evidence he produced that he had a good reputation for being peaceful and nonviolent, standing alone, could create a reasonable doubt. The District Court denied this request on the basis that such an instruction is discretionary in the Third Circuit under *Spangler v. United States*, 838 F.2d

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1387 (1972); *The Hearsay Exception for Coconspirators' Declarations*, 24 U. CHI. L. REV. 530, 541 (1958); *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1312 (1985).

85 (3d Cir. 1987), *cert. denied*, 487 U.S. 1224 (1988). This ruling exacerbates a conflict within the Courts of Appeals and with the decisions of this Court.

When the Writ of Certiorari was denied by this Court in *Spangler*, Justice White filed a dissent pointing out the confusion that existed in the Courts of Appeals on the issue of the standing alone charge and indicated that he would grant certiorari "to resolve the longstanding division in the courts on this point." 487 U.S. at 1224. Justice White described the division in the Courts of Appeals as follows:

> The decision below adds to the considerable disagreement that has arisen in the Courts of Appeals about whether and when it is proper for the judge to give the "standing alone" instruction to the jury. Some courts have held that such an instruction is never necessary and often, if not always, is improper because it actually misleads the jury. *See e.g. United States v. Burke*, 781 F.2d 1234, 1238-42 (7th Cir. 1985); *United States v. Winter*, 663 F.2d 1120, 1146-49 (1st Cir. 1981); *Black v. United States* 309 F.2d 331, 343-44 (8th Cir. 1962), *cert. denied*, 372 U.S. 934, 83 S. Ct. 880, 9 L. Ed.2d 765 (1963). Other courts have disagreed with this view, stating that at least in certain kinds of cases, if not always, a defendant is entitled to have the jury be instructed that reputation evidence in and of itself can create a reasonable doubt as to guilt. *See e.g. United States v. Lewis*, 157 U.S. App. D.C. 43, 482 F.2d 632, 637 (1973); *United States v. Cramer*, 447 F.2d 210, 219 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024, 92 S. Ct. 680, 30 L. Ed. 2d 674 (1972). In addition, many of the pattern jury instructions that have been used

> by District Courts around the country have included some kind of "standing alone" instruction. *See e.g. Burke, supra, at 1238; United States v. Callahan,* 588 F.2d 1078, 1086 n.1 (5h Cir. 1979). This confusion can be traced directly to statements made by this Court in *Edgington v. United States*, 164 U.S. 361, 366, 17 S. Ct. 72, 73, 41 L. Ed. 467 (1896), *and* in *Michelson v. United States,* 335 U.S. 469, 476, 69 S. Ct. 213, 218, 93 L. Ed. 168 (1948).

487 U.S. at 224, 108 S. Ct. at 2884-85.

This case represents an appropriate vehicle to resolve this conflict in the Courts of Appeals by identifying and reaffirming a class of case in which the "standing alone" instruction should be given.

The record in this case will show a hotly contested case with clear factual disputes where questionable proof of the defendant Burke's propensity for violence was presented and admitted during the prosecution's case in chief. For example, the government offered in a pretrial brief to prove that the murder victim, Donna Willard, attributed to the defendant Burke a threat to kill her with "two bullets in the head." This was offered by the prosecution as an excited utterance heard simultaneously by a group of employees and patrons at the victim's beauty parlor. The police reports of witness' interviews did not support the representation that Donna Willard attributed this threat specifically to defendant Burke, but only that she expressed this fear of "two bullets in the head" after being interviewed by federal agents serving a grand jury subpoena after which she contacted the defendant Burke.[30] In any event, the District Court allowed the testi-

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[30]These police reports were included in the defendant's appendix on direct appeal at pages 104A through 145A.

mony of four witnesses who allegedly heard this remark without holding an evidentiary hearing as allowed by Rule 103(C) of the Federal Rules of Evidence to determine whether preponderant evidence established that the "two bullet" remark was actually attributed to defendant Burke by the victim Donna Willard. These witnesses testified in graphic terms to Donna Willard's expressed fears of "two bullets in the head" but only one of those witnesses, Beverly Pinto, said that Willard attributed this threat to defendant Burke and Pinto was impeached with her two prior statements to police which failed to attribute this threat to Burke.[31] Accordingly, a substantial amount of highly prejudicial and questionable evidence concerning defendant Burke's propensity for violence was placed before the jury.[32] This is the factual backdrop which caused defendant Burke to present eight witnesses who testified to his good reputation for being peaceful and nonviolent.

In such circumstances, where questionable and prejudicial evidence of threats of violence were introduced by the prosecution and the government's case is otherwise dependent on the testimony of a single accomplice, the trial court should be required to give an instruction that a good reputation for peacefulness and nonviolence, standing alone, can create a reasonable doubt.[33]

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[31]The witnesses testifying on this issue were Beverly Pinto (267-268a), Dolores Fahy (282-285a), Kimberly McGolrich (695-714a) and Lorraine McGrossan (732-738a).

[32]The Court of Appeal's opinion (Appendix A) only discusses the admissibility of the Pinto testimony and ignores the impact of the three other witnesses on whether preponderant evidence supported a finding of admissibility.

[33]This was the rule in the Third Circuit prior to the *Spangler* case. *United States v. Logan*, 717 F.2d 84 (3d Cir. 1983).

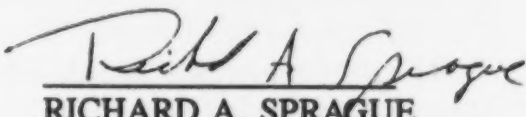
In *Edgington v. United States*, 164 U.S. 361, 366, 17 S. Ct. 72, 73 (1899) this Court ruled that a jury should be instructed that reputation evidence "may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." *See also, Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 218 (1948). The Third Circuit's decision conflicts with the above decisions of this Court and, given the nature of the evidence in this case, should not be allowed to stand.

We respectfully submit that given the existence of a clear split in the Circuits on this issue, guidance from this Court is particularly appropriate and would be beneficial to the bench and bar. The Circuits are drifting away from the clear statements in the *Edgington* case and prompt guidance and the establishment of a uniform standard for the giving of the "standing alone" instruction is clearly needed.

CONCLUSION

For the foregoing reasons, petitioner Robert B. Burke respectfully requests this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and to reverse the conviction of Robert B. Burke.

Respectfully submitted,



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Dated: October 18, 1994
Philadelphia, Pennsylvania

Appendix A
Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

93-2148

UNITED STATES

v.

ROBERT B. BURKE PP#995684,
Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 92-00268-1)
District Judge: Hon. William H. Yohn, Jr.
Argued: June 8, 1994

Before: MANSMANN and ALITO, *Circuit Judges*
and SIMANDLE, *District Judge**
Opinion Filed: July 20, 1994

MEMORANDUM OPINION OF THE COURT

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*Hon. Jerome B. Simandle, United States District Judge for the District of New Jersey, sitting by designation.

ALITO, *Circuit Judge*:

In August 1993, a jury convicted Robert Burke of murdering a federal witness, Donna Willard, in violation of 18 U.S.C. § 1512(a)(1)(A) (Count IV). In addition, Burke was convicted of four related charges:[1] racketeering in violation of 18 U.S.C. §§ 1961 and 1962(c) (Count I); arson, in violation of 18 U.S.C. § 844(i) (Count II); conspiracy to murder a federal witness, in violation of 18 U.S.C. § 371 (Count III); and use of interstate commerce facilities in the commission of murder for hire, in violation of 18 U.S.C. § 1958(a) (Count V). He was sentenced to life imprisonment for Counts I, IV, and V, a ten year term for Count II, and a five-year term for Count III. In addition, he was fined $25,000 for the murder for hire, and he was ordered to pay a special assessment of $50 for each of the five counts.

An attorney, Burke represented clients with personal injuries. The evidence at trial showed the following. Around 1987, Burke developed a scheme with two doctors, Robert Segin and Frank DeLia, to defraud insurance companies by submitting false bills for extensive medical and psychotherapeutic treatment on behalf of Burke's clients.[2] Most of these clients were knowledgeable participants in the scheme. At some point in the late 1980s, the fraud became the target of a federal criminal investigation.

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[1] The jury also returned a verdict against Burke under a RICO forfeiture count, 18 U.S.C. § 1963 (Count VI).

[2] In 1990, Burke pleaded guilty to a 106-count indictment arising from this scheme. The indictment included charges of money laundering, making false declarations to a grand jury, mail fraud, and obstruction of justice. Burke was sentenced to 5 years imprisonment for these crimes.

One of Burke's "clients" in this scheme was Donna Willard, a hairdresser. On March 1, 1990, Willard was served with a grand jury subpoena in connection with the investigation of Burke. Willard was shot twice in the head at point-blank range at her home on March 6, the night before she was scheduled to appear before the grand jury. Her 12-year-old son witnessed the murder. A prosecution witness, James David Louie, testified that he acted as middleman between Burke and Javier Lebron, to whom Burke paid $1000 for shooting Willard.

In this appeal, Burke advances three arguments. First, he claims that the district court erred in refusing to admit evidence of allegedly contradictory and self-impeaching statements made by Louie during taped conversations with John C. Foley, who had helped Louie arrange to have Lebron murder Willard. Second, Burke argues that the court should have excluded as inadmissible hearsay the testimony of Donna Willard's co-worker, Beverly Pinto, regarding remarks made by Willard that Burke had threatened to put "two bullets in her head" if she did not lie to the grand jury. Third, Burke asserts that the court improperly failed to give a jury instruction that "character evidence, standing alone, is adequate to produce a reasonable doubt." Appellant's Br. at 44. For the reasons stated below, we affirm the judgment of the district court.

I.

After agreeing to cooperate with the government's investigation of Donna Willard's death, John C. Foley secretly taped two telephone conversations he had with James David Louie. During these conversations, Louie made several statements tending to exculpate Burke in the Willard murder. Specifically, when asked by Foley, "Bob does not know

anything about the murder, does he?" Louie responded, "No, he doesn't." App. 66. In addition, Louie stated, "Bob [Burke] didn't come up with the money" for the Willard murder. App. 94.

At trial, Louie testified that he had acted as a middleman for Burke in arranging for Lebron to murder Willard. Louie further stated that he had concealed Burke's involvement in the Willard murder from Foley. On direct and cross examinations, Louie consistently stated that he had lied to Foley in order to conceal Burke's role in Willard's murder.

The defense unsuccessfully sought to introduce these portions of the tapes under two theories: (1) that the tapes fell within the co-conspirator exemption from the hearsay rule, and (2) that the tapes were prior inconsistent statements admissible as extrinsic evidence to impeach Louie. We hold, however, that the district court did not err in refusing to admit the tapes for these purposes.

The tapes do not fall within the coconspirator exemption from the hearsay rule, FED. R. EVID. 801(d)(2)(E). This provision states:

> (d) A statement is not hearsay if - . . .
>
> (2) Admission by party opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The plain meaning of this language is that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is admissible against *that* party. Here, Louie was not a coconspirator of the United States, and therefore his statements could not be offered against the

United States in this case. As we held in *United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir.), *cert. denied*, 479 U.S. 821 (1986), in rejecting an argument similar to Burke's, "the prosecution" is not "a 'party' against whom such evidence can be offered." *See also, e.g., United States v. Anderton*, 679 F.2d 1199, 1202-03 (5th Cir.1982); *United States v. Hackett*, 638 F.2d 1179, 1187 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

Burke argues that, even if Louie's statements are inadmissible hearsay under the Federal Rules of Evidence, their admission was constitutionally required. Contending that certain other statements made by Louie and Foley were introduced against him by the prosecution under the coconspirator rule, Burke argues that fundamental fairness, equal protection, and due process required the trial judge to admit Burke's evidence of Louie's out-of-court statements.

In support of this argument, Burke relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973). There, a defendant on trial for murder called as a witness a man named McDonald who had previously confessed to the same crime. On direct examination, the defense was able to introduce a written confession signed by McDonald, but on cross-examination by the state McDonald testified that he had previously repudiated that confession, and he reiterated that repudiation. When the defense then sought to examine McDonald as an adverse witness, the trial court refused "on the basis of a Mississippi common-law rule that a party [could] not impeach his own witness." *Id.* at 295. In addition, when the defendant attempted to show that McDonald had orally confessed to the murder on several occasions, these statements were held to be inadmissible because under Mississippi law declarations against interest were admissible only if they were against the declarant's pecuniary, rather than his penal, interest. *See id.* at 299. The defendant was convicted of murder and sentenced

to life imprisonment, but the Supreme Court reversed, holding that the exclusion of the evidence of McDonald's oral confessions, coupled with the refusal to permit the defense to cross-examine McDonald at trial, denied the defendant "a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

At best, *Chambers* provides limited and indirect support for Burke's argument here. *Chambers* establishes that under certain circumstances due process may be violated by the exclusion of defense evidence on the ground that the traditional hearsay exception for declarations against interest is limited to declarations against pecuniary interest. By analogy, Burke argues in this case that due process was violated by the exclusion of Louie's statements on the ground that the traditional coconspirator rule, as embodied in FED. R. EVID. 801(d)(2)(E), is limited to statements offered against a party to the conspiracy.

While we appreciate this argument, we are not in the end persuaded. The *Chambers* Court took pains to emphasize that McDonald's oral statements "bore persuasive assurances of trustworthiness." 410 U.S. at 302. The Court elaborated:

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case . . .. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.

410 U.S. at 300-01 (footnote omitted). Here, Burke has not shown that the out-of-court statements by Louie that are at issue bore similarly "persuasive assurances of trustworthiness." In addition, the *Chambers* court reveresed the conviction under review because of the combined effect of the exclusion of McDonald's inculpatory statements and the refusal to permit the defense to cross-examine him. In this case, the ability of the defense to cross-examine Louie was not restricted in any comparable way. Accordingly, we will not extend *Chambers* to reach the different circumstances present here.

The only other authority cited by Burke in support of his constitutional arguments is Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269 (1986). As its title suggests, this article is principally concerned with the introduction by a criminal defendant of statements made by a police officer or prosecutor. Here, of course, no such statements are at issue. Burke relies on the article's argument that equal protection may be violated if a hearsay rule applies differently to the prosecution and the defense in a criminal case. Whatever the merits of this argument, however, it is inapplicable in this case. The aspect of the coconspirator rule that Burke challenges is the requirement that a coconspirator statement must be offered against a party to the conspiracy. If Louie had been a coconspirator or agent of the government when he made the statements in question, Burke's argument would be more apposite. But since Louie held no such status, Burke's argument is misplaced.

Burke also sought to admit the tapes into evidence to impeach Louie. Louie, however, admitted in testifying that he

had lied to Foley in order to protect Burke[3] and the trial court refused to permit the defense to introduce the tape recorded conversations in which the statements were made.

Substantial precedent supports the proposition that if a witness admits making a prior inconsistent statement, extrinsic proof of the statement may be excluded. *Bankatlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1476 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 966 (1993); *United States v. Soundingsides*, 825 F.2d 1468 (10th Cir. 1987); *United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980). This approach, however, has been criticized by some courts and commentators. *See, e.g., United States v. Lashmett*, 965 F.2d 179, 182 (7th Cir. 1992); 3 David W. Louisell and Christopher B. Mueller, FEDERAL EVIDENCE § 358, at 564 (1979 & 1993 SUPP.). *See also Gordon v. United States*, 344 U.S. 414 (1953).

In this case, assuming for the sake of argument that the extrinsic evidence of Louie's statements should have been admitted, we are convinced that this exclusion was harmless. During his direct testimony and on cross-examination, Louie admitted numerous times that he had lied to Foley regarding

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[3]On direct examination, Louie stated, "Bob told me, he gave me specific instructions, he does not want to meet the gunman." App. 352. On cross-examination, Louie added:

> I don't want to tell Foley, yeah, Jack, Bob's involved because Jack's liable to go to Bob and say, yo, Bob I want some money and if he tells his girlfriend about the case, Strawberry, she'll go, she liable to blab it to the world or go to the Feds, say hey, there's a reward out for this, let me tell you what I know about it. I couldn't take that chance, I couldn't.

App. 378.

Burke's involvement. *See* App. 331, 343, 352-53, 371-72, 378-79, 395, 570, 573-74, 596-97. Our examination of the record convinces us that Louie was effectively impeached with this evidence. Although Burke contends that Louie would have been even more effectively impeached if the jury had heard the tape recorded conversations, we are convinced, based on the transcript of Louie's testimony and the transcript of the tape recorded conversations, that the exclusion of the tapes did not influence the jury. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946); *United States v. Echeverri*, 854 F.2d 638, 646 (3d Cir. 1988); *United States v. Schwartz*, 790 F.2d 1059, 1062 (3d Cir. 1986). Consequently, any error was clearly harmless. *See United States v. Lashmett*, 965 F.2d at 182-83; *United States v. Wali*, 860 F.2d 588, 591-92 (3d Cir. 1988).

II.

Prior to trial, the prosecution filed a motion *in limine* to allow it to introduce the hearsay testimony of Beverly Pinto regarding a statement made by Donna Willard several days before she was murdered. After a hearing on the issue held during the trial, the district court ruled the testimony admissible. App. 255.

A co-worker of Donna Willard at the "So Hair It Is" beauty salon, Pinto testified at the trial that she had been with Willard on March 1, 1990, when Willard was served with a grand jury subpoena. App. 266. According to Pinto's testimony, after the process server left the salon, Willard stated that she was going to call Burke, and she then spoke on the phone for about ten minutes. App. 267-68. Pinto testified that when Willard hung up, "She was real upset. She was shaking." App. 268. Pinto then stated: "[Willard] said that (Burke] had told her that he was, she was to lie to the Grand

Jury on his behalf and to commit perjury or else she'd be found dead with two bullets in her head." *Id.*

At the evidentiary hearing, the district court ruled that the testimony was admissible in part because it fell within the "excited utterance" exception to the hearsay rule, FED. R. EVID. 803(2). We agree with this ruling.

An "excited utterance" is defined in Rule 803(2) as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." If the declarant is unavailable, such a statement is not inadmissible hearsay. Willard was, of course, unavailable. A threat on one's life certainly qualifies as a "startling event" under FED. R. EVID. 803(2).[4] Moreover, Pinto testified that Willard was "upset" and "shaking" afterwards, app. 268, and so appears to have been "under the stress of excitement caused by the event or condition," FED. R. EVID. 803(2). Willard's remarks clearly were "relating to a startling event," FED. R. EVID. 803(2). Accordingly, the district court did not err in admitting this testimony.

Burke also argues that the court erred in failing to hold a full evidentiary hearing on this matter in accordance with FED. R. EVID. 104(c). Burke did not ask the district court to hold such a hearing, however, and he may not raise this issue for the first time on appeal. Moreover, the hearing held in the

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[4]According to a leading treatise on evidence, the "modern trend" permits the hearsay statement itself to qualify as evidence of the startling event. Jack B. Weinstein and Margaret A. Berger, WEINSTEIN'S EVIDENCE ¶ 803(2)[01] at 803-88 (1993) (citation omitted). In this case, Pinto's testimony regarding Willard's "shak[en]" and "upset" demeanor was also evidence that a startling event had just occurred.

district court was adequate to review the admissibility of the evidence.

In addition, Burke asserts that Pinto's testimony was more prejudicial than probative and ought to have been excluded by the district court under FED. R. EVID. 403. A trial court has broad discretion in determining whether to admit or exclude evidence under Rule 403. *United States v. Anderson*, 859 F.2d 1171, 1178 (3d Cir. 1988). A murder victim's report of a death threat from the accused describing the precise nature of her murder just five days prior to that murder seems quite probative on the question of the accused's guilt. The high probative value of the statement outweighs any undue prejudice to the defendant, and the trial court was well within its discretion to permit its introduction.

III.

Burke's final argument is that the district court improperly failed to instruct the jury that character evidence, standing alone, is adequate to produce a reasonable doubt. Burke called eight character witnesses who stated that he had a reputation in the community for being peaceful and non-violent. The court instructed the jury:

> Now, you also heard from a number of witnesses who talked about the defendant's reputation for being peaceful and non-violent. You have heard testimony the defendant, Robert Burke, has a good reputation for being peaceful and non-violent in the community where he lives and works.
>
> Along with all the other evidence that you have heard, you may take into

> consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime.

App. 1209-10.

Burke objected to this instruction because he wanted the judge to state more clearly that character evidence alone could create a reasonable doubt. But as Burke concedes in his brief, the instruction given by the district court was explicitly approved by our court in *United States v. Spangler*, 838 F.2d 85, 86-7 (3d Cir. 1988), *cert. denied*, 487 U.S. 1224 (1988). We are bound by *Spangler* here.

IV.

For these reasons, we affirm the judgment of the district court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ ALITO
Circuit Judge

Appendix B
District Court Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JUDGMENT IN A
CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)
Case Number: 2:92CR00268-1

UNITED STATES OF AMERICA

v.

ROBERT B. BURKE
(Name of Defendant)

A. CHARLES PERUTO, Sr.
Defendant's Attorney

THE DEFENDANT:
[ ] Pleaded guilty to count(s) _____

[ ] Pleaded nolo contendere to count(s) _____
which (was) (were) accepted by the court.
[X] was found guilty on count(s) 1, 2, 3, 4, 5

after a plea of not guilty.

Title/Sect	Nature of Offenses	Date Offense Concluded	Count Number(s)
18 USC §1962(c)	Racketeering.	05/31/90	1
18 USC §844(i)	Arson.	07/27/88	2
18 USC §371	Conspiracy to murder federal witness.	05/31/90	3
18 USC §1512(a)(1)(A)	Murder of a federal witness.	03/06/90	4
18 USC §1958(a)	Use of interstate commerce facilities in the	03/06/90	5

The Defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)- and is discharged as to such count(s) . [ ] Count(s)

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 204-36-1147

Defendant's Date of Birth: 10/02/47

Defendant's Mailing Address:

12/01/93

/s/
Signature of Judicial Officer

FEDERAL CUSTODY
PA

WILLIAM H. YOHN, JR.
JUDGE USDC EDPA
Name & Title of Judicial Officer

12/3/93
Date

Defendant's Residence Address:
2860 WALNUT HILL STREET
PHILADELPHIA PA 19152

* * *

DEFENDANT: ROBERT B. BURKE Judgment--Page 2 of 5
CASE NUMBER: 2:92CR00268-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life.

life on Count(s): 1,4,5
60 months on Count(s): 3 to run concurrently to Counts 1, 4 and 5.
20 months on Count(s): 2 to run concurrently to Counts 1, 4 and 5.

The term of imprisonment imposed by this judgment shall run consecutively to the defendant's imprisonment under any previous federal or state sentence.

[X] The court makes the following recommendations to the Bureau of Prisons:

The defendant shall pay the fine and special assessment in installments in accordance with the policies of the Bureau of Prisons.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender, to the United States Marshal for this district.
[ ] at _____ am/pm on _____.
[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
[ ] before 2:00 p.m. on _____.
[ ] As notified by the United States Marshal.
[ ] As notified by the Probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ _____ at _____ _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____

Deputy Marshal

* * *

DEFENDANT: ROBERT B. BURKE Judgment--Page 3 of 5
CASE NUMBER: 2:92CR00268-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years.

5 years as to Count(s): 1, 4, 5
3 years as to Count(s): 2, 3 Counts 1, 2, 3, 4, 5 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

The defendant shall pay the balance of any fine or special assessment that remains unpaid at the commencement of supervised release and adhere to the Court ordered installment basis. The defendant shall notify the United States Attorney for this district within 30 days of any change in residence or mailing address while any portion of the monetary penalties remains unpaid.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit

confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

* * *

DEFENDANT: ROBERT B. BURKE Judgment--Page 4 of 5
CASE NUMBER: 2:92CR00268-1

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	Assessment	Fine	Restitution	
1	$50.00		$.00	$.00
2	$50.00		$.00	$.00
3	$50.00		$.00	$.00
4	$50.00		$25,000.00	$.00
5	$50.00		$.00	$.00
Totals:	$250.00		$25,000.00	$.00

FINE

[ ] The court has determined that the defendant does not have the ability to pay interest in full.
It is ordered that:
[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[ ] in full immediately.
[ ] in full not later than _____.
[X] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if

incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $_____ over a period of months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500.00 unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation Officer. The probation officer shall notify !he United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

* * *

DEFENDANT: ROBERT B. BURKE Judgment--Page 5 of 5
CASE NUMBER: 2:92CR00268-1

STATEMENT OF REASONS

[X] The Court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The Court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 43
Criminal History Category: I
Imprisonment Range: LIFE to ___ months and __ months consecutive.
Supervised Release Range: 3 to 5 years
Fine Range: $25,000.00 to $250,000.00

[ ] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[ ] The sentence departs from the guideline range
[ ] upon motion of the government as a result of defendant's substantial assistance.
[ ] for the following reason(s):

Appendix C
Court of Appeals Orders

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-2148

USA

vs.

ROBERT B. BURKE

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 9, 1994.

/s/
Circuit Judge

Dated: August 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-2148

United States of America

v.

ROBERT B. BURKE

Pursuant to rule 41(b) of the Federal Rules of Appellate Procedure, it is 0 R D E R E D that issuance of the certified judgment in lieu of the formal mandate in the above cause be, and it is hereby further stayed until September 14, 1994.

/s/
Circuit Judge

Dated: September 9, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-2148

UNITED STATES OF AMERICA

v.

ROBERT B. BURKE

Pursuant to rule 41(b) of the Federal Rules of Appellate Procedure, it is 0 R D E R E D that issuance of the certified judgment in lieu of the formal mandate in the above cause be, and it is hereby stayed until September 19, 1994.

/s/
Circuit Judge

Dated: September 14, 1994

Appendix D
Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

93-2148

UNITED STATES

v.

ROBERT B. BURKE
Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 92-00268-1)
District Judge: Hon. William H. Yohn, Jr.

Before: MANSMANN and ALITO, *Circuit Judges*
and SIMANDLE, *District Judge**
(Opinion Filed: July 20, 1994)

* Hon. Jerome B. Simandle, United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on June 8, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on December 1, 1993 be and the same is hereby affirmed.

Attest:

/s/
Clerk

July 20, 1994

Certified as a true copy and issued in lieu
of a formal mandate on September 20, 1994

Teste: /s/

Clerk, United States Court of Appeals
for the Third Circuit

Appendix E
Transcript of 12/15/90 Recording

Original Transcript Cover Page

The following is a transcript of a conversation between JOHN C. FOLEY and JAMES DAVID LOUIE, which occurred on December 15, 1990.

PREAMBLE

This is Special Agent KEVIN J. MOONEY. Today's date is December the 15th, 1990. I'm going to utilize this recording device and give it to JOHN C. FOLEY who (DID NOT RECORD) ...JAMES D. LOUIE in an effort to get him to call us back at which time we will record his conversation.

(CALL BEING PLACED)...

UF: (RECORDING) thank you.

(CALL BEING PLACED)

KJM: The time is 10:01.

Circuit Court Record 000044a

* * *

Original Transcript Page 1

DATE: 12/15/90
TIME: 10:03 A.M.

JCF - JAMES C. FOLEY
JDL - JAMES D. LOUIE
UI - UNINTELLIGIBLE

JCF: Hello.

JDL: Hello.

JCF: Yeah, how you doing?

JDL: Fine.

JCF: Yeah...I was I went over to your job this morning.

JDL: Yeah.

JCF: Yeah I had something that had to get moved real fast.

JDL: What was that?

JCF: A 1990 Cadillac.

JDL: Yeah.

JCF: The guy wanted it burned.

JDL: Oh really?

JCF: Yeah.

JDL: Well...wh...where is it? Do you have it?

JCF: Ah...I took it back to him. And I can get it back ah ...say around 11 o'clock.

JDL: Yeah and how much did he want to pay?

JCF: I don't know. He said you know, he'd let you look at it and ah you know you give him the price and ah you know he's looking for

* * *

Original Transcript Page 2

estimates right now.

JDL: For estimates?

JCF: Yeah.

JDL: Seven hundred dollars.

JCF: How much?

JDL: Seven hundred.

JCF: Seven hundred?

JDL: Yeah uh we could do it for five hundred you know I mean...

JCF: You can do it for five hundred?

JDL: Yeah. I mean but see let me tell you something right ... is that what you called my old bout this morning?

JCF: Yeah because ah something else happened in the meantime.

JDL: What happened?

JCF: Ah something with, ah Mr. J.

JDL: What happened?

JCF: Well, you know it's uh it's getting involved.

(BUZZ COIN REQUEST)

JDL: Alright tell me, I'm on a pay phone.

JCF: Yeah I'm gonna you know I have to talk to you. Privately about it and also about the car.

JDL: Well tell me about it on the phone about Mr. J.

JCF: No, I can't it's...ah you know I don't know who's

Circuit Court Record 000046a

* * *

Original Transcript Page 3

listening in or anything like that.

JDL: Jack, I'm on a pay phone.

JCF: Yeah, I know you are.

JDL: Yeah, well where you at?

JCF: Uh I'm in Center City right now.

JDL: Oh wh...are you at a pay phone or where are you?

JCF: No I'm at a, I'm at the guy's a house right now.

JDL: Yeah.

JCF: And ah...

JDL: Well listen...

JCF: Yeah.

JDL: There's no sense keeping me in suspense. Tell me about Mr. J.

JCF: Oh, I can't do that ah...

JDL: Because, did he get picked up again or what?

JCF: Oh, I don't know ah...

JDL: Is he dead or what?

JCF: It's, it's mediocre.

JDL: What do you mean it's mediocre?

JCF: Ah it's just ah mediocre. It's ah you know more or less like a bad play.

JDL: A bad play?

JCF: Yeah.

JDL: Like how? Did he get busted?

Circuit Court Record 000047a

* * *

Original Transcript Page 4

JCF: No, not yet you know. I'm just hoping you know nothing goes wrong that's all. Because he came over...

JDL: Huh?

JCF: ...he came over last night and ah...you know he didn't look so hot.

JDL: He came over and he didn't look so hot (UI)...what is he hung out on drugs or something?

JCF: Yeah he's on the drugs again, yeah.

JDL: Oh, you know see I told you. Don't even bother looking for him. Remember I told you that.

JCF: No, I didn't go looking for him, he came over to my apartment.

JDL: Yeah, but the fact is that you told people you know that uh you know where you lived you know I told you you shoulda never done that you know?

JCF: Yeah.

JDL: Didn't I tell you that?

JCF: Yeah because ah you know he said what about Dave? Does he have any ah you know jobs lined up?

JDL: Yeah.

Circuit Court Record 000048a

* * *

Original Transcript Page 5

JCF: And I said well there might be a couple. I'm not too sure.

JDL: Well why didn't you just tell him that Dave got busted, he's in jail or something you know what I mean?

JCF: Tell him Dave's been busted that he's in jail.

JDL: Right, the, the, the Feds grabbed him for something else that somebody snitched on him you know?

JCF: Yeah because I...I think J's ah you know like I said you know I has, I was contemplating everything and you know ah you know if...

JDL: Remember, remember I told you leave him be, don't tell people where you live if you're looking for him, remember I told you that?

JCF: Yeah. Well I, I just you know happened to hint around because he wanted to get in contact about ah you know, any ah upcoming jobs.

JDL: Yeah but this, this I told you it was a bad move. Remember I told you that?

JCF: It was a bad move to do that, to pull the trigger?

JDL: No, it was a bad move to go look for him.

JCF: No I didn't go looking for him.

JDL: I know but you told people to tell...to tell "J"

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where you lived at. It was a bad move, I told you that.

JCF: Um-hum.

JDL: I told you to leave him be. You know.

JCF: Yeah because I mean he came over last night and he had the gun on him.

JDL: Oh yeah.

JCF: Yeah.

JDL: See...let me tell you something. The only way they can convict us, you and I is that we'd have to sign a statement or a confession.

JCF: Uh-uh.

JDL: You got me?

JCF: Yeah.

JDL: That's the only way they can convict either one of us.

JCF: Yeah, because he's got me a little leery. I mean you know he comes over with the damn guy I mean ah you know you're gonna go away, I don't know if you're gonna go away or what you're...

JDL: No, no, I'm not going no where, believe me. You know I already know that for a fact. We all know that for a fact you know we found out yesterday that no ah, that since they didn't

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<u>Original Transcript Page 7</u>

file a case they don't know that the the company is uh is going to uh they're recommend, recommending a downward departure and outside the guidelines. So we're all going to get probation or 6 months or a suspended sentence. Because they don't have no evidence. They don't have nothing.

JCF: They don't have nothing at all?

JDL: Nothing.

JCF: Ah.

JDL: Nothing.

JCF: Yeah, because you know like I said how about if you know if this crazy Puerto Rican turns around and ah you know goes and robs a grocery store with that damn gun...

JDL: What?

JCF: You know...we're sunk.

JDL: No we're not sunk because the fact is that uh he don't remember me. He doesn't know where I live or anything. And I mean, I mean it's a shooting in New Jersey, you know what I mean?

JCF: Yeah.

JDL: You got me?

JCF: Well how about they run a ballistics test on

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Original Transcript Page 8

the damn gun?

JDL: Yeah he could have bought it anywhere. I mean you know he's, he's smart enough you know what I mean?

JCF: Yeah plus he's...

JDL: (UI) if he's not high on nothing...you know what I mean?

JCF: Yeah plus he's looking for some more money too.

JDL: Sure, sure, you, you know if he's back if he's back on the stuff he'll be back in jail again.

JCF: Yeah, he's...he's back whacking, yeah.

JDL: You see what I mean. That's why I told you you shoulda never told people where you live if you wanna (UI) saying tell him where I live you know. I told you that.

JCF: Yeah.

JDL: But you won't listen to me.

JCF: Yeah, Christ.

JDL: You won't listen to me, see...

JCF: Um-hum.

JDL: You know, well see what you have to do is just move away from there you know what I mean?

JCF: Yeah cause ah...

JDL: Just move yourself away from there you know.

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JCF: Yeah when I. . .when I brought the Cadillac over right ah Strawberry started asking me questions about ah (UI).

JDL: Well look, let me tell you something for him to burn that 1990 Cadillac there have to be two things that have to happen, it's best to do it out of New Jersey.

JCF: It's best to do it out of New Jersey?

JDL: Yeah, otherwise you'll never get paid if it's in New Jersey.

JCF: Yeah.

JDL: Never get paid. Because of the new of of the law. Okay?

JCF: Yeah.

JDL: We'll never get paid in New Jersey.

JCF: You'll never get ah we gotta, you got to burn it in New Jersey or you got to burn it in Pennsylvania?

JDL: You've got to burn it in Pennsylvania. You've got to take it out of the state and he reports it stolen and then we just burn it up.

JCF: Yeah. Yeah like uh the main thing I'm concerned about say if "J" gets locked up you know and he's he's high on that stuff and uh you know he starts flapping his yap.

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JDL: Well so what do you want to do with "J" then, do you want to go out and blow him away or what?

JCF: Well, I don't know, I'll leave it up to you. You know to see what you want to do with him.

JDL: Well, I'm telling you the best thing to do was what I told you (UI) when you said he was out you know gunning for him.

JCF: Yeah.

JDL: Fuck him you know what I mean. Don't, don't let him know where you live or nothing you know.

JCF: Yeah.

JDL: Don't tell nobody you know you don't understand, you don't listen to me.

JCF: Uh-hum.

JDL: You know.

JCF: Yeah because when Strawberry saw the Cadillac...

JDL: Yeah.

JCF: She, she wanted to know if there was any uh you know uh if there was anything traceable to Burke on that and I said no, it's not ah...

JDL: Well, ah didn't I tell ya see see you know, you must have told her about Burke you know you

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shoulda never said a word to her about it you know.

JCF: Yeah because ah Strawberry's putting two and two to get her. She wanted to know ah you know ah about the car when I had it that time.

JDL: Yeah we li see ah...

JCF: She wanted to know what my involvement was with the girl.

JDL: Yeah.

JCF: And I told her I said...

JDL: Well how does she know about the girl?

JCF: Huh?

JDL: How does Strawberry know about the girl?

JCF: Ah you know she has following it on the news that night that I told you about* she was deeply watching it on the news.

JDL: I told you she's got too much mouth.

JCF: Who Strawberry's got too much mouth?

JDL: Yeah, I'm telling you.

JCF: Yeah.

JDL: I'm telling you, you know.

JCF: Yeah.

JDL: See you need to get away from her you know what I mean?

JCF: Yeah, yeah.

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JDL: You know ah ah that's a bad deal him finding ya at the house you know what I mean and him walking around with the gun you know what I mean?

JCF: Yeah.

(SIGNAL FOR COIN DEPOSIT)

JDL: Hold on. I got to put more money in the phone.

JCF: Yeah.

JDL: Hold on a minute (UI).

JCF: Okay ah...

OPERATOR: Forty-five cents please.

JCF: Damn.

JDL: Hold on.

JCF: Alright.

OPERATOR: You have five cents credit. Please... Thank you.

JCF: Yeah, you still there?

JDL: Yeah, look let me tell you a little more about this Cadillac.

JCF: Yeah.

JDL: If he ain't going to do it today it's no sense for him talking around ah and shopping for prices.

JCF: Right.

JDL: You understand?

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JCF: Yeah.

JDL: I mean the car's worth "X" amount of dollars right and he wants to get paid for it the best way to do it is to have it taken out of state into Pennsylvania.

JCF: Right.

JDL: Burn it up there.

JCF: Uh-huh.

JDL: But first before he does that...

JCF: Yeah.

JDL: He makes me an extra set of keys for the, car...

JCF: Right.

JDL: You know because ah I'm telling you you will not be if it's burned in New Jersey they have time to investigate it and he will not get paid for a while.

JCF: Okay, so ah you know that's ah...

JDL: You got me. So therefore ah we take it and we'll park it someplace in Pennsylvania you know (UI) I'm I'm busy today so ah...

JCF: Yeah.

JDL: ...you know...ah because I'm helping my sister move.

JCF: Um-hum.

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JDL: See and then ah burn it up in in Pennsylvania someplace cause therefore you know ah when the police call it happened out of state so therefore there is no investigation you know.

JCF: Yeah.

JDL: It's just a matter of the insurance company just going out and paying it off.

JCF: Okay . Yeah. Now, what do you want to do about "J" ah you know he keeps on coming over hitting me for money you know and...

JDL: Well Jack...

JCF: I'm running low.

JDL: This is the first time, this is the first time that you say "J's been by your house hitting you for money.

JCF: Yeah. Yeah cause uh he's uh really whacked out on the stuff.

JDL: Jack this is...Jack...this is the first time, you know what the best thing you could do for him?

JCF: What?

JDL: Take that nine millimeter away from him.

JCF: Take the nine millimeter away from him?

JDL: Yeah.

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JCF: Yeah cause you know if ah...

JDL: Take the nine millimeter away from him and ah...just tell him that uh you know you'll hold it for safekeeping or something, just take it away from him.

JCF: Yeah the...the one thing I'm worried about...

JDL: Because, because...

JCF: The one think I'm worried about is you know the the sentencing coming up you know like I, like I asked you earlier that if ah you know you go to jail and says you know ah "J" or you know uh what happened if you...if you squeal I'm in the middle I'm fucked.

JDL: Jack.

JCF: Right.

JDL: Jack, what did I tell you?

JCF: Yeah.

JDL: Jack, Jack...

JCF: What ?

JDL: ...I told you I was offered a deal for immunity.

JCF: You were offered a deal for immunity?

JDL: I told you that.

JCF: Who offered you the deal?

JDL: The Feds.

JCF: The Feds offered you the deal?

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JDL: Yeah. And you know what I told them?

JCF: What?

JDL: Say. I'll tell ya what they offered me...they offered me immunity...

JCF: Right.

JDL: ...ah...from prosecution...

JCF: ...immunity from prosecution...

JDL: Yeah and they offered me, ah ah, the Witness Protection Act.

JCF: That Federal Witness Protection Program?

JDL: Right.

JCF: Okay.

JDL: And ten thousand dollars.

JCF: And ten thousand dollars in cash.

JDL: Right, and you know what I told them.

JCF: What?

JDL: I don't know a thing.

JCF: Oh, yeah what were you doing giving the middle finger just by accident?

JDL: Huh?

JCF: What were you doing giving them the middle finger by accident?

JDL: No I told them I don't know nothing.

JCF: Yeah.

JDL: I don't know Dick.

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JCF: Yeah.

JDL: You got me.

JCF: ...like I said...how are we going to get the gun off of "J" though?

JDL: Just ask him for it.

JCF: He won't give it to me.

JDL: No?

JCF: No, he probably wants money for it you know.

JDL: Yeah. Well listen...you should...you should here's what you should tell him...

JCF: What?

JDL: You should say"J", do not walk around with that gun you know...

JCF: Um-hum.

JDL: You know... Ah see you...I told ya (UI) or you didn't tell me "J's" been by your house knocking you off for money.

JCF: He just came over ah the last two nights.

JDL: Yeah.

JCF: Yeah and I you know, lent him twenty I figured no uh no problem on Thursday right?

JDL: Yeah.

JCF: And then he came over last night and wanted ah you know another twenty so I gave him an other twenty.

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JDL: Um-hum.

JCF: And ah you know that's that's the thing I'm worried about and he's walking around with that God damn gun in his ah hip pocket.

JDL: Uh-hum.

JCF: So you know I mean ah you know that gun, if they trace that guy, you know, he you know and he's looking at doing some time he's probably going to sing maybe make a deal for himself.

JDL: No, well he can't because he's the...he's the gun man. He can't. 1

JCF: He's the gun man?

JDL: No they...he can't.

JCF: No, they, they can't make a, they can't make a deal with him.

JDL: No, no, no, no, no, no.

JCF: Now what about you and I? They can't do nothing with us then right?

JDL: Right. Because he has to point the finger at us and he'd have to sign statement against us and I don't know him. Do you know him?

JCF: Yeah he's, yeah he has to sign a statement against us.

JDL: Right I don't know him, do you know him?

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JCF: Yeah, I don't know him.

JDL: Do you know him.

JCF: I don't know because if he comes over tonight man, you know I'm a really sweating bullets there.

JDL: Yeah, I mean uh see he's the gun man, he can't make a deal.

JCF: He can't make a deal.

JDL: No, no, no, no, no, he can't make a deal.

JCF: Yeah because. . .

JDL: He can not make a deal.

JCF: Like I said, last night ah...

JDL: That's why I told you never tell my, nobody where I live or my phone number or nothing,

JCF: I never did. I never told him that okay. I never told him where you lived..

JDL: Right.

JCF: And when Strawberry saw the Cadillac...

JDL: Yeah.

JCF: ...she said, you know that s Burke's Cadillac again you know what involvement does he have with the girl and I'm saying like what the hell you talking about?

JDL: Right.

JCF: I said Burke does not have any you know

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Original Transcript Page 20

involvement with the girl at all. The only thing that I know that Burke had uh uh that night he had dinner with the doctor or something like that. I don't know what it was you know and uh you know she's ah you know coming out asking all types of questions I mean I was getting drilled like a you know about the Cadillac for four hours today.

JDL: Jack.

JCF: What?

JDL: Listen, I told ya Strawberry is too inquisitive and too much (UI) you know what I mean?

JCF: Yeah.

JDL: I told ya.

JCF: Um-hum.

JDL: You know didn't I tell you that?

JCF: Yeah.

JDL: Ya know.

JCF: Alright.

JDL: Well actually, Bob' s car is sold so I mean ah (UI) ah they don't even have it no more...

JCF: Yeah.

JDL: ...he doesn't have it, he don't have it no more, it's... it's been sold.

JCF: Yeah because she...she was harping on me.

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You know I'm trying to give her answers ah...

JDL: Well you shoulda never let her see the car, after you...

JCF: She said you know...it's, it's, Burke's car, it's a relationship with Burke's car now. Uh you know what does Burke have to do with the girl?

JDL: Nothing.

JCF: And I said you know maybe, maybe she was a client, I don't know.

JDL: Yeah.

JCF: Uh- huh.

JDL: See you don't, you see, let me tell you something you don't want to tell Strawberry too much because you know what see, suppose she goes to the Feds or somebody cause there's a there's a reward.

JCF: Yeah.

JDL: You know what I mean?

JCF: Oh there's a reward?

JDL: Oh sure!

JCF: How much?

JDL: I don't know what it is you know what they pay you for information.

JCF: Yeah.

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JDL: You got my point?

JCF: Yeah now how about if ah you know what I'm saying ah Burke does not know anything about the murder, does he?

JDL: No, he doesn't.

JCF: Now what happens if he you know turns wit...

JDL: Burke.

JCF: ...what happens if he turns witness and says hey...

JDL: Burke, Burke is not, listen Burke is not opening his mouth at all.

JCF: Burke's not opening his mouth at all?

JDL: Nothing.

JCF: Nothing at all huh.

JDL: They don't even want to even speak to Burke.

JCF: Yeah.

JDL: No.

JCF: Uh humm, okay, you know ah maybe I'll have to, I'll have to ah you know...

(COIN REQUEST)

JDL: Well call me back at this number...

JCF: I wanna, I wanna, I wanna show you this ca...

OPERATOR: Please deposit 65 cents.

JDL: Call me back at this number. Are you ready?

JCF: Can I call you back at this number?

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OPERATOR: Sixty-five cents.

JDL: Yeah.

JCF: No...

OPERATOR: ...for the past six minutes.

JCF: No, ah what time are you going to go to work Monday?

JDL: Jack.

JCF: What?

JDL: Jack.

JCF: Yeah. Hello.

OPERATOR. Please deposit 65 cents.

JCF: Yeah, hello. Hello.

(DIAL TONE)

(SA KJM PUTS TIME ON TAPE, ASCERTAINS WHETHER ANYTHING WRONG) (PHONE RINGS)
(LOUD CONVERSATION TAKING PLACE IN BACKGROUND)

JCF: Hello.

JDL: Hello.

JCF: Yeah, what's going on?

JDL: The phone got cut off cause I needed to put more money in it.

JCF: Yeah, yeah, now this, this guy I can get...I coulda got the car up to 11 o'clock today okay...

JDL: Yeah?

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JCF: And after that he's gonna go up to New York and he's gonna come back down early Monday morning.

JDL: Yeah.

JCF: Yeah ah, what time are you going to go to work Monday?

JDL: I'm not.

JCF: You're not gonna go to work Monday?

JDL: Oh, Monday?

JCF: Yeah.

JDL: I don't know. I could, I could be leaving at four 0' clock in the morning on Monday you know what I mean.

JCF: Yeah.

JDL: Yeah if if they call me at 4 o'clock. I leave at 4 o'clock you know.

JCF: Yeah I know they're not going to call you at 4 o'clock with that.

JDL: Huh?

JCF: Yeah that's...that's the only thing you know the the time commitment there.

JDL: Why is that?

JCF: Ah you know because I can only have it you know for ah you know to show it to you and...

JDL: I, I don't need to see it Jack!

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JCF: You don' t?

JDL: I don't need to see it at all.

JCF: Um-humm. Seven hundred dollars, right?

JDL: Right!

JCF: Ah over in Pennsylvania it'll be done.

JDL: Right.

JCF: Okay because it's ah...

JDL: But, this is what we want, we need an extra set of keys for it and we need twenty-four hours.

JCF: An extra set of keys and twenty-four hours for the car.

JDL: Right.

JCF: Okay.

(CALL WAITING SIGNAL)

JCF: Hello. Yeah Dave...

JDL: Yeah.

JCF: Yeah, okay, I'm gonna...I'm going up to North Jersey.

JDL: For what? What (UI)...

JCF: I got to go up to Strawberry's ah mother's she's in the hospital.

JDL: Are you taking, you're not driving that car up are you?

JCF: No, no, no ah the brother's taking us up ah

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either the brother or ah Vince is gonna take us up.

JDL: Right.

JCF: And then, my mother's in bad shape in the hospital too. So I'm gonna be you know going here and there man I'm gonna be going nuts at hospitals this weekend.

JDL: Right.

JCF: Yeah so.

JDL: Well I, I, I ah won't be home at all today.

JCF: Yeah.

JDL: Not at all.

JCF: Alright , yeah, so I'll have to get in contact with ya Monday from work then.

JDL: Alright.

JCF: And then ah you know we'll meet we'll look at the car and then you know give ya the extra set of keys and then you'll be on your way,

JDL: Right but we want the money first.

JCF: You want the money first.

JDL: Oh yeah.

JCF: Yeah, okay be no problem with that.

JDL: I don't need me to see him and I don't need him to do anything.

JCF: Yeah because ah you know I hate like hell

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going back over to Camden right now and ah you know facing her you know because I'm going to get the third degree all the way up to North Jersey.

JDL: Well listen you just tell her there is no connection, understand?

JCF: Yeah.

JDL: Eh, can't you do that?

JCF: I, I try telling her that but she just don't wanna listen to this shit. Ya know she swears up and down that ah, you know ah, you know like she got inquisitive when she saw it on the news that time back in May.

JDL: Yeah.

JCF: You know she that's when she got real inquisitive.

JDL: Just tell her there is no, it's the wrong per...it's the wrong... it's the wrong one.

JCF: Yeah.

JDL: Yeah, there is none.

JCF: And then she's asking a...

JDL: Hah?

JCF: She's asking me what's my connection with Burke.

JDL: Nothing. You don't even know him, you never

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met him.

JCF: And then she asking me what's my connections with the girl...

JDL: You don't know her.

JCF: And I told her I don't know her.

JDL: Right. Never met her.

JCF: Then he says well what about Dave does...did Dave know the girl?

JDL: No, he doesn't.

JCF: He doesn't?

JDL: No.

JCF: And ah you know what about Juan I mean she goes through. . .

JDL: Who?

JCF: She goes through the whole God damn third degree.

JDL: Listen.

JCF: Yeah.

JDL: I'll go tell her to keep her mouth shh, ya don't it there is no connection, you want me to go over there and tell her, I'll tell her.

JCF: When you come over and tell her?

JDL: What?

JCF: When would you come over and tell her? You can't do it today.

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JDL: Why I, I could be at her house in five minutes.

JCF: You could be at the house in five minutes.

JDL: Yeah.

JCF: Ah, no because I won't be over in Jersey until about maybe ah...

JDL: Well I could be there in five minutes.

JCF: You can be there in five minutes?

JDL: Yeah.

JCF: No cause I'll be over here for a little...little bit longer.

JDL: Well what are you doing over there?

JCF: What am I doing over here?

JDL: Yeah.

JCF: Well right now I 'm a walking the streets and I'm gonna go up to the hospital later on.

JDL: Yeah.

JCF: To see my mother and then I'm gonna go you know try to get back over like I told you earlier with her and a you know go up and see her mother.

JDL: Um-hum.

JCF: Yeah and ah I don't know if I wanna go back to New Jersey or not today.

JDL: Why?

JCF: Well you know like I said I get the third degree

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from her.

JDL: Yeah.

JCF: Yeah.

JCF: Yeah.

JDL: Well you want me to tell her you know?

JCF: No you don't have to tell her, no.

JDL: Because you don't know, you never met Bob, you never met the girl, there is no involvement with either one, so you know...

JCF: Yeah. Cause you know she's you know because of the experience she went through in life you know she wants to know if she's living with a ah...

JDL: No. Tell her you don't have nothing, I'll just...I'll tell her so you know.

JCF: Yeah uh-huh. Ah...humm...yeah, that's a, that's pretty hairy right there cause like I said I don't know how long you know before I go back over there you know what I mean. I don't know how long you're gonna be there moving.

JDL: Huh?

JCF: I don't know how long you're going to be there moving.

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Original Transcript Page 31

JDL: All day.

JCF: All day?

JDL: Yeah.

JCF: Yeah. Alright because I'll be on the go.

JDL: Well I'll...I'll stop by and I'll tell her.

JCF: You' re gonna stop by and you' re gonna tell her?

JDL: I'll tell her, yeah.

JCF: No, uh, yeah she's ah don't go to the, don't go to the house man. "

JDL: Why?

JCF: She's real upset you know.

JDL: Yeah well I wanna tell her, I wanna speak to her you know. See, listen, I don't know why you're driving, I don't need to look at it.

JCF: Yeah.

JDL: You know.

JCF: Yeah but I'm gonna try and take care of her you know and see what goes on.

JDL: Alright.

JCF: Okay ah, I don't know ah what what's going to go down today or not.

JDL: Uh-huh. But I, but ah as far as "J" goes, there is not deal for him.

JCF: There's no deal for "J" at all.

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JDL: Hah?

JCF: There's no deal for "J" at all then.

JDL: Hah? Wait a minute, wait a minute. There's too much noise here, I'm calling you at a pay phone. Alright now?

JCF: Yeah, okay, cause I'll, I'll probably see you Monday.

JDL: What hospital your mother at?

JCF: Hah?

JDL: What hospital your mother at?

JCF: She's up at a, a private hospital.

JDL: Where at?

JCF: Yeah, up at a, whatever you call it...Rolling Hills.

JDL: Ah well, I know where that is. Is...is she under your last name?

JCF: No, no, no, she's under...

JDL: Huh?

JCF: ...she's under a name that uh you know I had a tough time finding out because I'm with Strawberry she doesn't ah you know want me to know her name.

JDL: who...who's mother is this?

JCF: Yeah.

JDL: Who's mother is it that you're talking about?

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JCF: Ah, my mother.

JDL: Yeah well what*'s her last name? What name is she under?

JCF: I don't know, I, I had to go up to the hospital and find out, was she registered under, she didn't register under the same name she's ah married to the guy to.

JDL: Yeah.

JCF: Cause she doesn't want me up there because of my involvement with Strawberry.

JDL: Oh.

JCF: Yeah, she's a, my younger sister came over and got me.

JDL: Oh yeah.

JCF: Yeah because ah you know a I , I got a sneaky suspicion that if "J" comes over ah you know either today or tomorrow, I don't know if you want me to bring him over Monday to meet you or not.

JDL: No, no, no.

JCF: No.

JDL: No, no.

JCF: Uh-huh.

JDL: No.

JCF: Oh boy, yeah because like I said I'm running

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low on funds with him.

JDL: I, I don't have any either so, you know what I mean.

JCF: Yeah, okay.

JDL: Well we'll talk on Monday hear.

JCF: Yeah, I'll see you Monday okay ah, you know ah it depends what time.

JDL: Right.

JCF: Um, you know because I'll be done work at five.

JDL: Alright.

JCF: And um we'll see what goes down with that okay?

JDL: Alright.

JCF: Okay, I'll talk to you then.

JDL: Right.

JCF: Bye now.

(DIAL TONE)

Circuit Court Record 000078a

* * *

Original Transcript Page 35

KJM: This is Special Agent Kevin J. Mooney. (UI) 12/15/90 (UI) incoming call (UI) accepted by John C. Foley and the time is 10:30...A.M.

Circuit Court Record 000079a

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Appendix E
Transcript of 12/19/90 Recording

Original Transcript Cover Page

The following is a recorded telephone conversation between JAMES DAVID LOUIE and JOHN C. FOLEY which occurred on 12/19/90 at 1:00 p.m.

PREAMBLE

This is Special Agent (SA) Kevin J. Mooney, today's date is December the nineteenth nineteen ninety and the time is 1:00 o'clock p.m. I'll be supplying this recording device to John C. Foley who will be utilizing it to record a conversation with James David Louie and others yet unknown, by contacting him at his beeper and awaiting a call back at area code 908-257-9847 - number dialed.

Recorded message - $2.20 please.
Thank you for using AT&T.

SA MOONEY: Do I have to hit the pound?

MK: You don't have to hit the pound do you? Just hit the number.

JF: Yeah just dial the digits, the number in there now real fast.

MK: Just dial the number.

JF: Area code (UI)...then let it, no, no then, ...

SA MOONEY: Then hang up.

JF: No no no.

RECORDING: Thank you.

(PHONE RINGS)

SA MOONEY : 1 :07.

Circuit Court Record 000080a

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Original Transcript Page 1

JF: JOHN C. FOLEY
JL: JAMES DAVID LOUIE
UI: UNINTELLIGIBLE

JF: Hello!

JL: Hello!

JF: Dave.

JL: Yeah.

JF: Yeah it's Jack how you doin'?

JL: Fine. How're you?

JF: Okay man. I'm up here in North Jersey at Straw's mom's.

JL: Yeah.

JF: Yeah she's real sick and they let her out of the hospital today.

JL: Who's this?

JF: Straw's mom.

JL: Who's mom?

JF: Strawberries.

JL: Oh I thought it was your mom that you told me was ill!

JF: No, no I had to come up here to North Jersey to see her mom on Saturday, right?

JL: Yeah. Well I can't hear ya'.

JF: Okay, can you hear me now?

JL: A little bit.

JF: Yeah ...

Circuit Court Record 000081a

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Original Transcript Page 2

JL: Is there a button you push for loudness?

JF: Pardon me, no, not, I don't have one to push for loudness.

JL: Yeah.

JF: Alright, so the good thing about it is ...

JL: Hold on, hold on, I, yeah go ahead ....

JF: Alright the good thing about it is, she believes that we had nothing to do with the murder, okay?

JL: Right.

JF: And uh, the nice thing is uh, you know Mister "J" came over again before I left, hello.

JL: Yeah.

JF: Yeah he came over before I left and he said he's broke again, right?

JL: Yeah.

JF: And he was tellin' me that ah, you know, he needs some money real bad and he's interest, interested in doing these ah, next hits.

JL: Huh?

JF: He's interested in doing these next hits!

JL: (UI), hold on. I'm at, I'm at a pay phone.

JF: You at a pay phone?

JL: Yeah.

JF: Yeah 'cause I'm ah, I'm up here by one too and it's the only way I can get over here because Strawberrie's ah, brother drove me over here to the phone.

JL: Oh yeah?

* * *

Original Transcript Page

JF: Yeah. where you at?

JL: Huh?

JF: Where you at?

JL: I'm a, I'm, I'm up here in North Jersey.

JF: Oh, you up in North Jersey?

JL: (UI).

JF: Yeah well you're close by then.

JL: Right.

JF: Yeah you're close, you know, you're nearby cause I'm only gonna be here for a few minutes. I don't even know where the hell I am because of her brother driving me around.

JL: Well your, your landlady ....

JF: Huh?

JL: ... called your office today.

JF: Who?

JL: Your landlady.

JF: My landlady?

JL: Yeah.

JF: You mean my landlord.

JL: Landlord yeah.

JF: Oh yeah?

JL: Yeah.

JF: I didn't know about him calling. What'd he call about?

JL: I don't know he said it was an emergency.

JF: He said it was emergency?

Circuit Court Record 000083a

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Original Transcript Page 4

JL: Yeah .

JF: All right.

JL: You know (UI) ...

JF: Yeah.

JL: ... ah, so what have you been tellin' people at work?

JF: What have I been telling at work?

JL: Yeah.

JF: I've been saying, you know, it's, it's my mom.

JL: Alright . . .

JF: And they you know ...

JL: ... that's what I told him, that's what I told him too.

JF: ... yeah. So he said nothing along those lines.

JL: Wait, wait, hold on, wait, a truck's going by I can't hear.

JF: Truck going by ya'? Okay.

JL: Huh? I can't hear ya'.

JF: Okay I can hear you, can you hear me?

JL: No I can't, I can't, I, I, you know .... so what else happening?

JF: All right. The thing about it is, is, you know, like I said J's, you know, really needs that money bad.

JL: Yeah.

JF: So, you know, it was like we talked about the hit list.

JL: Wait I can't, Jack I can't hear you,

(Pause)

JF: Yeah Dave?

JL: Yeah.

* * *

Original Transcript Page 5

JF: Yeah now can you hear me?

JL: Little bit.

JF: Yeah okay. Remember we talked about those people that were on the ah, the hit list?

JL: Yeah.

JF: Yeah the doctor ah...

JL: Yeah, yeah.

JF: ... ci, Ciminio or Simone and that guy Rose (ph), and the guys over in Collingswood?

JL: Yeah.

JF: Yeah. Ah, what's a name that, that was the names that you and I talked about that, you know, you said ...

JL: (UI) we won't talk about it on the phone we'll talk about it later.

JF: You want to talk about it later?

JL: Wait a minute I can't, wait a minute hold on.

(Pause)

JL: Where you at anyway?

JF: Ah, like I said, you know I'm only gonna ...

JL: Huh ?

JF: ... I'm only gonna be here a few minutes because her brother's takin' me back I don't know where the hell I am.

JL: All right. Well, I'll tell you what I'll, I'll come by and I, (stutters) are, are you gone home tonight?

JF: No, no I'II probably be down tomorrow.

JL: Tomorrow?

Circuit Court Record 000085a

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Original Transcript Page 6

JF: Yeah.

JL: Alright I'II stop by and see you tomorrow.

JF: No I'm not gonna be there tomorrow okay I'm just gonna stop real fast so I might have to give you a call. But the thing is, you know, Jay's been really buggin' me, you know? I tried gettin' the gun off him.

JL: Right.

JF: All right?

JL: Yeah.

JF: He said he won't give me the gun. All right?

JL: Yeah.

JF: He wants a price for the gun.

JL: Now, wait a minute. See I can't hear ya'.

JF: Yeah. He said he wants a price for the gun.

JL: All right.

JF: Now, you know, like I said about the hit list, you know?

JL: Yeah.

JF: Okay and ah, you know this is the thing. He wants to get...

JL: Jack I can't, wait a minute Jack there's too many cars going by.

JF: All right.

(Pause)

JL: Alright go ahead a little better ...

JF: Okay. Remember you and I said we were gonna hit Burke after he got out of jail ... for some money?

Circuit Court Record 000086a

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Original Transcript Page 7

JL: Yeah do, do what?

JF: You remember when we were gonna hit after he got out of jail?

JL: Where's that?

JF: You know, Burke.

JL: Huh?

JF: You know when we said we were gonna get some money out of Burke?

JL: Oh yeah.

JF: Yeah. The only thing is is ah, you know, can he come up with the money now? You know, because J's dyin' for the goddamn money. I know you don't have any money and I don't have any money.

JL: Yeah.

JF: Right?

JL: Well look well ah, ah, well we'll.. talk about it when I see you, you know, ah, cause I, you know, I can't ah, you know I can't hear ya'.

JF: Yeah. You can't hear me?

JL: No I can't hear you.

JF: Huh, well what's, what's your phone number?

JL: Huh?

JF: What's your phone number?

JL: It's ah ... I don't know, why you going to a different phone or something or what?

JF: I might to go to a different phone, yeah.

Circuit Court Record 000087a

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Original Transcript Page 8

JL: You know, well there's nothing we can do anyway until I see you anyway to explain to you.

JF: You wanna see?

JL: Huh?

JF: Yeah if you can, call me back.

JL: What?

JF: Can you call me back? Get, get to a better phone.

JL: I'll call you back at what number?

JF: This number right here.

JL: All right.

JF: I'll be waitin', okay?

JL: Uh, well I have to go get some change because, you know, it's expensive to call you.

JF: Okay yeah. All right, you got the phone number, right?

JL: Right.

JF: Okay I'll be here.

JL: Right.

JF: Okay we'll talk about the other stuff, all right?

(JF: He's gonna call back. Gonna get some change and call back)

(SA MOONEY: Time is 1:15. That was a conversation with JAMES DAVID LOUIE ah, and that terminated. We are waiting for a return phone call)

(Phone rings) (SA: MOONEY: What time is it? 1:17.)

JF: Yeah Dave?

JL: Yeah.

Circuit Court Record 000088a

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Original Transcript Page 9

JF: Now can you hear me?

JL: No I can't quite hear you yet.

JF: Can you hear me now?

JL: No not quite I, I mean I can hear a little bit.

JF: Well, okay this is the thing. Like I told you before I left, right?

JL: I can't hear, go ahead.

JF: Okay. J came over, all right?

JL: I can't hear, hold on. You have to wait till the traffic goes by or something.

JF: Okay.

JL: Listen, just wait until I see you or something.

JF: You wanna see me?

JL: Yeah. Well when you gonna be home?

JF: It'll either be tomorrow night or Friday night. What if....

JL: what are you gonna do miss the whole weeks at work?

JF: ... yeah I'm gonna have to man.

JL: Because ah, Christmas is Tuesday.

JF: Yeah I know. Hey, you know, what the hell I mean (UI) gotta go by with it, you know, I mean it's ah ...

JL: Because I've been by your place there, you know, ah, I, I was by Saturday ...

JF: Yeah.

JL: ... you know, there ain't nobody there, you know?

JF: Uh huh.

JL: And I was by last night. Dale and I were by last night

Circuit Court Record 000089a

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Original Transcript Page 10

nobody was there.

JF: Yeah.

JL: But it looked like somebody busted the door.

JF: They busted the door?

JL: Yeah.

JF: On what the side?

JL: Yeah.

JF: Damn! Yeah I couldn't get over that then (ph). Now, now you can hear me, right?

JL: Huh?

JF: Now you can hear me good, right?

JL: A little bit.

JF: Yeah. Okay like I told you when Jay ...

JL: Well, wait a minute. (Operator recording - Please signal when through.) Hello?

JF: ... yeah. Now this is ...

JL: (UI) wait a minute til these cars go by. I'm on the road I, you know, all these cars go by and, it's, it's the noise, you know.

JF: Yeah. Yeah the main thing is, you know...

JL: I can't hear (UI).

JF: ... you listening to me? You listening to me now?

JL: Hold on.

JF: Okay.

(Pause)

JL: Hello.

Circuit Court Record 000090a

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Original Transcript Page 11

JF: Yeah now can you hear me?

JL: Little bit.

JF: Now, if you don't have any money and I don't have any money then we gotta hit Burke for money, right?

JL: Yeah?

JF: Okay. Is Burke gonna come up with the money though?

JL: Oh yeah.

JF: Burke will come up with the money? I

JL: Who?

JF: Burke will come up with the money?

JL: Yeah.

JF: Okay. Now Jay wants a price for that damn gun.

JL: He wants a what?

JF: He wants a price for that damn gun. You know, for us to turn that gun over.

JL: Uh huh.

JF: If he doesn't get any jobs, okay?

JL: Well see, what did you tell him anyway about it? Did you tell him, first of all you tell him don't walk around with that thing, first of all.

JF: That's right. I did.

JL: Yeah and what he say?

JF: He said well it's my gun I can do what the fuck I want, but the thing about it is he does not have any bullets.

JL: He doesn't have any?

Circuit Court Record 000091a

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Original Transcript Page 12

JF: He doesn't have any bullets. No he needs bullets again.

JL: Oh.

JF: So you're gonna have to send, bring the bullets with ya'.

JL: Well see I, well I'll have to send you the store to get it, I'll show you where to get it.

JF: Yeah cause he's startin' to put two and two together too, okay?

JL: Wait, I can't hear you. There's an oil truck stop here in front of me.

JF: Yeah, tell him to move.

JL: Wait til I see you then we'll discuss it.

JF: Yeah, but listen to this, okay?

JL: I can't hear ya'!

JF: Now can you hear me?

JL: No.

JF: Yeah ... 'cause he's startin' to put two and two together too, J!

JL: Yeah.

JF: Yeah. And he knows that Burke had something to do with it to keep Willard quiet from testifying...

JL: Listen, listen.

JF: Yeah.

JL: Ah, he has (UI) right, but the fact is that ... hold, hold on there's a truck gone by here.

(Pause)

JL: Listen.

Circuit Court Record 000092a

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Original Transcript Page 13

JF: Yeah.

JL: It's no good for him to try and squeeze us, you understand?

JF: Yeah.

JL: Cause he ain't got no bullets for it, right?

JF: Yeah, but I think for him doin' a good job with the Willard ah, incident I thought ...

JL: I can't hear what you're saying.

JF: ... okay. For him doin' a good job with Willard I told him you'd buy the gun back. You'd buy the gun off him!

JL: Oh yeah, how much does he want?

JF: A thousand.

JL: Oh, is that all?

JF: Yeah.

JL: All right.

JF: What do you think about that offer?

JL: Well that's good.

JF: That's good?

JL: Yeah.

JF: Yeah because see, like I said he's startin' to put two and two together, he knows that you didn't come up with the money and I didn't come up with the money and then he's thinkin' Burke came up with the damn money.

JL: Well that way he doesn't know that though.

JF: But he's, but I told him, you know, he's startin' to put two

Circuit Court Record 000093a

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Original Transcript Page 14

JL: Because Bob didn't come up with the money.

JF: ... the what?

JL: Bob didn't come up with the money.

JF: Bob didn't come up with the money.

JL: No.

JF: But, but these other hits Bob's gonna come up with the money, right?

JL: Huh?

JF: Bob's gonna come up with the money with these...

JL: Wait, wait I can't hear you.

(Pause) ... Bob didn't come up with the money.

JF: No?

JL: No.

JF: But what about these other hits, that's the thing, you know, like I said ...

JL: That's gonna be somebody different comin' up with the money.

JF: ... yeah?

JL: Oh yeah.

JF: 'Cause you know I don't have the money ... nobody has any money except Burke, you know that as well as I do.

JL: Well, we know where the money is though.

JF: We know where the money is.

JL: Right.

JF: Okay. All right, now I'll give you a call probably tomorrow night when I come down on Friday night, all

Circuit Court Record 000094a

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Original Transcript Page 15

right?

JL: Well ah, well that all depends upon if I can talk to you or not you know what I mean?

JF: Yeah.

JL: You know ...

JF: Right.

JL: ... so what night are you coming down or what?

JF: I don't know, either Thursday or Friday okay cause I got, I have some Christmas shopping to do ...

JL: Well Friday I'm gonna be ah, let me see .... Friday. I have to meet with the boys on Friday on something.

JF: You gotta meet with ...

JL: Hold on.

JF: ... you gotta meet with the boys?

(Pause)

JL: On Friday I'm meeting with Cimini (ph) and all them on Friday.

JF: Are you meeting with Cimini (ph) on Friday or Cimino (ph), right?

JL: Yeah. Hold on. (Pause) What?

JF: You meetin' with Cimino on Friday?

JL: Yeah.

JF: Yeah, what over in North Jersey again or South Jersey?

JL: North Jersey.

JF: You gonna meet with them in North Jersey, huh?

JL: Huh?

Circuit Court Record 000095a

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Original Transcript Page 16

JF: You gonna meet with them on North Jersey on Friday, late Friday night or early?

JL: No ear, Friday afternoon.

JF: Friday afternoon?

JL: Yeah.

JF: Yeah. Okay I'll, I'll call your beeper.

JL: Well now see I don't know, I don't know, you know, if I'm gonna be ah, you know, depending, cause I don't know where I'm gonna go, but we're, we're supposed to have a meeting on Friday...

JF: You're supposed to have ...

JL: ... (UI).

JF: ... you're supposed to have a big meeting on Friday?

JL: Yeah. Hold on I can't hear hold on.

(Pause)

JL: Listen.

JF: Yeah?

JL: Ah, ah ...

JF: I might be up here, I'II give you a call okay if it's gonna be up here in North Jersey on Friday, right?

JL: What?

JF: If you're gonna go to the meeting I might be here, if you're gonna have it in the early afternoon on Friday, okay?

JL: Don't they have, don't they have a phone up there where you're at up there?

Circuit Court Record 000096a

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Original Transcript Page 17

JF: No. No I don't even trust that damn phone everybody's using the godamn thing.

JL: Oh yeah? I'll have to tell you something else.

JF: What?

JL: The Feds picked up Dale and was asking him about the, like computers and so forth.

JF: Oh yeah?

JL: Yeah.

JF: Man...

JL: And about Balu.

JF: ...oh yeah?

JL: Yeah.

JF: I don't know nothing man.

JL: Oh yeah, I can't hear hold on. But Dale told them he doesn't know nothin'.

JF: Right.

JL: He doesn't know nothin'!

JF: Uh huh. That's, that's, hey Dave.

JL: Yeah.

JF: I'll call you on Friday at...

JL: I can't hear you hold on. (Recording comes on - Sixty cents please). What'd you say?

JF: Okay, I'll either call you tomor, I'll call you tomorrow ... hello?

JL: Hello?

JF: ...yeah.

Circuit Court Record 000097a

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Original Transcript Page 18

(OPERATOR - Sixty cents overtime please)

JL: Alright hold on please. (Change deposited. Operator - thank you. Go ahead).

JF: Yeah, you there? Hello?

JL: Hello?

JF: Yeah. If I'm ...

JL: (UI) about it.

JF: ... if I'm up here Friday I'II give you a call on your beeper, okay?

JL: Yeah, but if I don't call you back right away you just have to wait or somethin'.

JF: Okay no problem.

JL: You know but, but, well wait, I'll just wait until you come cause I ain't doin' nothing til you come down anyway so there's no sense gettin' together about this or that.

JF: Yeah.

JL: I mean, I mean you ain't gonna be home so you know what I mean?

JF: Yeah okay.

JL: So ah, I'll just wait until you come home.

JF: Yeah but the main thing ...

JL: You gonna work Saturday?

JF: No, no I'm gonna be off all week, man.

JL: Huh?

JF: I'm gonna be off all week.

Circuit Court Record 000098a

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Original Transcript Page 19

JL: You're gonna be, you're not working Saturday?

JP: No.

JL: Okay so ah, well, well ah, Christmas is Tuesday so you gonna work Monday?

JF: I don't know yet, depends, you know, they might use, they might have a ah, you know, a, a skeleton crew that day.

JL: Yeah.

JF: Because a lot of people will be off. Okay?

JL: Yeah.

JF: Yeah so I'll give you ...

JL: How can you afford to be off without gettin', without money?

JF: ...right. Huh? Well I can get some money there's no problem there, okay?

JL: Okay hold on. What'd you say? Hello?

JF: Yeah.

JL: How can you afford to be off without money?

JF: Ah, I had some put away.

JL: You did?

JF: Yeah.

JL: Well you better call your landlord cause he said it was an emergency.

JF: Okay.

JL: You know what I mean?

JF: Dig it (ph).

Circuit Court Record 000099a

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Original Transcript Page 20

JL: All right.

JF: All right I'll talk, I'll to you on Friday then, okay?

JL: Well, if not Friday, you know, I'll see you then, before you come home or somethin'.

JF: What?

JL: I said if not Friday I'II see you when you come home.

JF: Yeah, now what if J if I come ...

JL: Wait a minute, hold on.

JF: ... okay.

(Pause)

JL: What are you saying'?

JF: Now okay, if I come home Thursday and J comes over what should I tell him about the other hits?

JL: Listen, you're not comin' home so we ain't tellin' him dick yet.

JF: Okay, but when I, okay if I don't speak ...

JL: You're not comin' home you said, right. So how you gonna see him you're not comin' home?

JF: Like I said he's like a goddamn, you know, he knows when I'm there and all that stuff like when I left you ah, Saturday afternoon ...

JL: What?

JF: ... when I left you Saturday afternoon, right?

JL: Yeah.

JF: I got over there at 3:00 o'clock he's bangin' on the door at 3:30.

Circuit Court Record 000100a

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Original Transcript Page 21

JL: Yeah.

JF: Yeah, so he must have a, you know, some relative livin over there. You know how those Puerto Ricans are.

JL: Yeah, well I told you you should've never told the address out, you know.

JF: Right.

JL: I told you (UI).

JF: Yeah.

JL: What? Hello.

JF: Yeah. The only thing I gotta do is tell J, like now how 'bout if J asks me, what're you doin' are you talkin' to ah...

JL: I can't hear you.

JF: ... J, J would wanna know, J would wanna know if you're gonna, you know, like, he knows, he's got an idea like I said where the money's comin' from, from Burke, okay?

JL: Yeah.

JF: On these other hits.

JL: Listen.

JF: Yeah?

JL: Wait until I come, wait until I see him I'II, we'll set up a time when I can talk to him.

JF: Right on.

JL: All right?

JF: Okay.

JL: All right.

Circuit Court Record 000101a

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Original Transcript Page 22

JF: All right, so I'II call you either tomorrow or Friday, okay?

JL: Right, but I won't see him either, either day.

JF: Right. I won't be in work either day, okay?

JL: Right.

JF: Right on, bye.

JL: Bye.

Circuit Court Record 000102a

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Original Transcript Page 23

(JL: He hung up).

(It's 1:27 p.m., the time is 1:27 p.m. this is Special Agent Kevin J. Mooney).

Circuit Court Record 000103a

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Appendix F
Excerpts of Trial Testimony

Louie - Direct 39

staging of the accident. I mean, burning of Ms. Anderson, I was just like a soldier for Bob.

Q Did you, let me ask you something, had you ever been asked to participate in a murder before?

A No, sir.

Q And had you participated in a murder before?

A No, sir.

Q Where did you shop around to look for a hit man?

A I went right over to Camden, New Jersey to see my friend Jack.

Q Who is Jack?

A Jack Foley is a crony of mine and we have done a lot of jobs together.

Q What did you tell Jack about what it was that you were looking for?

A I told Jack, I said, Jack, look I got a problem. I says, Jack, I need a hit man because there' s this girl whose going to testify before a Federal Grand Jury and if she testifies, there's going to be an awful lot of people going to jail.

Q Did you tell Jack Foley that Bob Burke was involved?

A No, sir.

Q Did Jack Foley know bob Burke?

A No, sir.

Q Why didn't you say to him, Bob Burke is involved in this?

A There was no need to go into details.

Circuit Court Record 000331a

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Louie - Direct 40

Q Did Foley say he would try to find someone?

A Oh, yeah.

Q And do you recall what it was that he said he could find or who?

A Yeah, he said he knew somebody in the project, because Foley lived in a project. So, we waited to see his friend and his friend wanted, he though like maybe $5,000. So, we waited to see him but he didn't show up.

Q After that first person didn't show up, did you talk to Foley about anyone else?

A Oh, yeah. Foley says to me, look, I got this friend of mine, J.

Q Did you know this person J?

A No, sir.

Q And what, if anything, did Foley say about this J?

A J says that -- well, Jack and J were selling drugs, number one, and that J shot his own cousin with a nine millimeter gun but that Mr. J might need some bullets.

Q Did Foley say whether this Mr. J would be interested in the job?

A Yes.

Q Now, you testified earlier that you believed it was a Thursday that you had the conversation first with Robert Burke, is that right?

A That's right.

Circuit Court Record 000332

* * *

Louie - Direct 51

A No, sir.

Q Did you know if she was the one you were supposed to murder?

A No, sir.

Q What did you do at that point?

A Well, at that point I said, Jack, there's too much confusion on the street and she could be the baby sitter and that could be the wrong person, so I says, call it off.

Q Where did you drive after you left the neighborhood on Sunday night?

A Okay, I took Mr. J home and as soon as we got, as soon as we entered Camden we went down this abandoned road and Mr. J wanted to stop and try out the bullets. So he got out of the car and he was walking along shooting out the lights. And he didn't like the bullets. Mr. J told me that he's not going to use the bullets that I gave him but that he had his own bullets.

Q Now, during the course of this ride, there or back, did you ever tell Mr. J this is for Robert Burke?

A No, sir.

Q Was there any reason to?

A No, sir.

Q What did you do Monday -- well let me strike that. After shooting the, after Mr. J was shooting at street lights, did you, in fact, go back to New Jersey?

Circuit Court Record 000343

* * *

Louie - Direct 60

her down. He popped two slugs in her and I said to Mr. J, well, where's the casings. He said he has them. So, then I reached in my pocket and took out the money that Robert Burke gave me. I handed that to Jack Foley. Jack Foley counted. Him and Mr. J talked for a couple of seconds, Jack

took some of the money and put it in his pocket and gave the rest to Mr. J.

Q And where did you go next?

A We went to Camden, New Jersey, bought Mr. J some more drugs, took Mr. J home, took Jack home.

Q Let me ask you, stop you there, from the time you drove Mr. J home that night, did you ever see him again?

A Mr. J?

Q Yes.

A Oh, later on, yeah.

Q Would that have been in prison or out of prison?

A Out of prison.

Q Did you, at any point during the course of driving back and forth between Pennsylvania and New Jersey tell Mr. J that Robert Burke was involved?

A No, sir.

Q Why not?

A Well, Bob told me, he gave me specific instructions, he does not want to meet the gunman.

MR. PERUTO: Not what? I didn't hear that.

* * *

Louie - Direct 61

THE WITNESS: He does not want to meet the gunman.

BY MR. DOBKIN:

Q After you dropped them off in New Jersey, what did you do then?

A I came back to the scene. I drove around the block. The police had the street closed. I seen the TV crew and I went back home and I called Robert Burke.

Q Let me ask, why did you return to the scene of a crime when you just participated in a murder?

A Well, because the fact is that when I drove, when we swung around the block to drive by I didn't see no activities, so I had -- I came back just to see if I had been had, you know, that Mr. J could have jumped in the car and said he did it and we drove off and I gave him the money and, you know, I'm out the money and the hit.

Q Now, let me ask you something, did, was there any activity when you returned to the neighborhood?

A Oh, yes, yes, the street was full of cars and the police had it blocked off.

Q And where did you go next?

A I went home.

Q And where were you living at this point?

A I was living in Narbeth, Pennsylvania.

Q And what did you do when you got home?

A I went home and I called Robert Burke.

Circuit Court Record 000353a

* * *

Louie - Direct 79

A Nothing,.

Q Were you telling the truth to Jack Foley when he called you about this stuff or were you lying to him?

A Oh, I was blowing smoke at him.

Q Why were you blowing smoke at Jack Foley?

A Well, I was building his confidence because Jack was worried that I might tell on him.

Q Now, Jack Foley also was very inquisitive about Robert Burke during these phone conversations, isn't that right?

A That's right.

Q And you didn't know you were being taped, did you?

A No, sir.

Q Was it common for Jack to be inquisitive asking all kinds of questions about Bob Burke?

A Sometimes, yes.

Q And when he asked you questions about Bob Burke during these phone conversations, did you say, oh, yes, Bob Burke is guilty, he's involved in the murder, is that how you responded?

MR. PERUT'O: Objection.

THE COURT: Sustained.

BY MR. DOBKIN:

Q What did you say in regard to Robert Burke's role in the murder?

A I said that Bob had no, he's involved in the murder.

Circuit Court Record 000371a

* * *

Louie -Direct 80

Q He's not involved in the murder?

A Right.

Q Was that true or was that false?

A That was false.

Q Was that another example of blowing smoke at Jack Foley?

A Well, I sure wasn't about to tell Jack, because that would have left, that would have meant that Jack would know and Bob would be mad about it and the fact that Jack might tell.

Q Did Jack make some reference to his girlfriend?

A Oh, yes.

Q That his girlfriend was curious about what was going on?

A Yes.

Q Did you think it would be a good thing if you told Jack and he told his girlfriend the whole story?

A Oh, no that would be disastrous.

Q In fact, did you ever tell Jack Foley that Bob Burke was behind the murder?

A No.

Q At one point, did you tell Jack Foley that it was some mysterious group of people in Virginia?

A I might have.

Q Was that true or false?

A That was false.

Q Why would you tell Jack Foley it was people from

Circuit Court Record 000372a

* * *

Louie - Direct 81

Virginia?

A Just to blow smoke at Jack and Jack liked excitement.

MR. DOBKIN: Just one moment your Honor.

BY MR. DOBKIN:

Q Now, your first plea agreement with the Government, the Government agreed to file a motion if you cooperated, is that right?

A That's right.

Q And just leave the no commitment about sentence, is that right?

A That's right.

Q In your second plea agreement, when you pled guilty to the murder, is it open ended like that first plea agreement or is the Government committed as to what it will recommend for you?

A Well, in the second plea agreement, the Government will recommend 25 years without parole.

Q And that's if you cooperate?

A That's right.

MR. DOBKIN: I have no further questions at this time your Honor.

THE COURT: All right, cross-examination.

CROSS-EXAMINATION

BY MR. PERUTO:

Q And of course, at the time, of the second plea

Circuit Court Record 000373a

* * *

Louie - Cross 86

THE COURT: All right.

(End of sidebar.)

BY MR. PERUTO:

Q At the time, Mr. Louie, did your blowing smoke at Foley, you knew very well that Robert Burke had already entered a plea of guilty to all these accident cases, didn't you?

A Yes, sir.

Q And you knew that that included your case, didn't you?

A Yes, sir.

Q And you knew it was announced in open court that Robert Burke was prepared to give full testimony in those cases, didn't you?

A Yes, sir.

Q But your blowing smoke at Foley because Bob might be mad about it if I told Foley, is that what you mean.

A No , no.

Q What do you mean, Burke would be angry?

A Well, that, he'd be angry because of facts as Bob told me that he didn't want to meet with the Government and I don' t want to tell Foley, yeah, Jack, Bob's involved because Jack's liable to go to Bob and say, yo, Bob I want some money and if he tells his girlfriend about the case, Strawberry, she'll go, she liable to blab it to the world or go to the Feds, say hey, there's a reward out for this, let me tell you what I know about it. I couldn't take that chance, I couldn't.

Circuit Court Record 000378a

* * *

Louie - Cross 87

Q Well, why didn't you say that instead of saying, you did it because Bob might be mad you told him.

A Well, sure, he'd be mad. I mean, he'd be, he'd be pissed.

Q You mean you were covering your butt, weren't you?

A Well, yes.

Q You didn't have the slightest concern if Bob would be angry with you?

A Oh, yes.

Q You didn't think he would mind if you stole his car and tried to sell it?

A He's insured.

Q I see. But you're now concerned with how Robert Burke would feel about you and that's why you're lying to Foley, am I correct?

A Lying about Foley?

Q To Foley.

A Well, sure I'm lying to Foley.

Q Tell me something, Mr. Louie, you drove back after the murder to make sure you hadn't been ripped off for some money by someone who hadn't really killed this young lady, am I correct?

A I drove back after the murder to make sure I wasn't ripped off or Bob wasn't ripped off and that the job was done.

Circuit Court Record 000379a

* * *

A He told me so. You'd of never figured that out for yourself, would you?

A Oh, yes.

Q Now, sir, you do understand in this trial that the murder of Donna Willard is charged against Robert Burke, don't you?

A Yes.

Q And you further know that since you never told Foley that he had anything to do with it and you never told the actual gunman that he had anything to do with it, it depends, this case, on your testimony, am I correct, sir?

A That's right.

Q And you do realize that the jury would have to believe you in order to convict, don't you?

MR. DOBKIN: Objection, objection.

THE COURT: Sustained.

Q Now, sir, we started out by you putting your hand on the Bible. What's that Bible mean to you?

A It means that you're supposed to tell the truth and nothing but the truth and that's what I'm here to do.

Q I understand that, that that's why your here.

A That's right.

Q Now, what does the Bible mean to you in the oath?

MR. DOBKIN: Objection.

THE COURT: I think there's a specific rule about

Circuit Court Record 000395a

* * *

Louie - Cross 79

A -- months later.

Q Not right after the killing, right?

A No.

Q Then, according to you, you wanted to get the gun back after Burke was in jail, right?

A Months, months.

Q And you never had any conversations before Burke went to jail about needing money to get the gun back, right?

A I don't quite understand your question.

Q Then you never had any conversation --

A With who?

Q --with Mr. Burke, this man, about needing money to get the gun back, correct?

A No, Bob was in jail, I...

Q Any you were afraid that that gun might be traced to Jay, who in turn traces to Foley and/or you or Foley to you, correct?

A Well, it couldn't trace to me.

Q Right. And under no circumstances could they trace it to Burke, could they?

A No.

Q The most that they could trace is back to you, since you never told Foley or Mr. Jay about the gun, correct"

A That is true.

Q You never told those two fellows about Burke, correct?

Circuit Court Record 000573a

* * *

Louie - Cross 80

A That's right.

Q So, who were you protecting and would be willing to spend your money to get that gun back?

A I was protecting Robert Burke, as well as myself.

Q I see. Because if they found the gun you knew you'd have to say, yes, I did this and Burke told me to do it, is that what you mean?

A That I did what?

Q How would they know by finding this gun that Burke had anything to do with it?

A They wouldn't.

Q But the possibility is that the gun would be led to you, correct?

A It couldn't be -- well, no, it would -- the only way it could be linked to me if Foley told.

Q Right.

A If Foley opened his mouth, that's the only way.

Q Did you expect Foley to open his mouth?

A No, I didn't expect Foley to open his mouth.

Q Did you trust him?

A Sure, all of the stuff that we had done, oh, yeah.

Q And did you plan to tell -- if they did say -- if Foley did say this to you were you planning to deny it?

A I don't understand that your --

Q Was it part of your plan that if Mr. Jay got caught with

Circuit Court Record 000574a

* * *

Louie - Cross 102

(Jury out at 12:10 o'clock p.m.)

THE COURT: Could I see counsel for a minute?

(sidebar discussion held off the record.)

(Court in recess; 12:10 to 1:30 o'clock p.m.)

THE COURT: You can tell them they can bring the witness in. You may bring the jury in now.

(Jury in at 1:32 o'clock p.m.)

THE COURT: All right, Mr. Peruto, you may resume.

MR. PERUTO: Thank you, your Honor.

BY MR. PERUTO:

Q Louie, when you gave your statement to the authorities on December 28th, 1990, you knew at that time that Foley had taped you, didn't you?

A No, I didn't.

Q Well, how did you know that they had you on the murder?

A The Government doesn't come and arrest me unless they got something and the gig was up.

Q You mean you just figured it was over?

A When the FBI come and arrested me the Government had me, they would never come and -- you know, unless they knew something.

Q Now, had you in your conversations with Foley -- well, strike that.

You told us you did not tell Foley anything about Burke?

Circuit Court Record 000596a

* * *

Louie-Cross 103

A That'sright.

Q Did you ever lie to Foley or was it you just withheld information?

A About what?

Q Any of your conversations with Foley?

A I don't think -- I don't think we ever discussed Bob.

Q I understand that you did not tell him about Bob--

A That's right.

Q -- what I'm asking you is, in your conversations with him had you ever lied to him?

A Yes -- blew smoke at Foley? Yes.

Q And what were the lies that you told him?

A As to what?

Q As to anything.
A I don't know what you're getting at.

Q Lies.

A Like what?

Q Well, since you know you had lied to him, tell us what you know you had lied to him about.

A I -- I don't quite understand, Mr ....

Q Well, did you ever tell Foley that you were hired at all to do the hit on Donna Willard?

A No -- that I was hired? No.

Q You told Foley that you'd be in a lot of trouble if this lady talked to the grand jury, right?

Circuit Court Record 000597a

* * *

(2)

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-694

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT B. BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's constitutional rights when it refused to admit into evidence the prior statements of one of petitioner's co-conspirators who testified as a government witness.

2. Whether the district court erred by refusing to instruct the jury that evidence of petitioner's good character was, standing alone, enough to create a reasonable doubt about his guilt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is unpublished, but the decision is noted at 31 F.3d 1174 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1994. Pet. App. D1-D2. The petition for a writ of certiorari was filed on October 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of murdering a federal witness, in violation of

18 U.S.C. 1512(a)(1)(A); conspiring to do so, in violation of 18 U.S.C. 371; conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); committing arson, in violation of 18 U.S.C. 844(i); and using interstate commerce facilities to commit a murder for hire, in violation of 18 U.S.C. 1958(a). He was sentenced to life imprisonment and fined $25,000. The court of appeals affirmed. Pet. App. A1-A12.

1. Petitioner was a lawyer who had a former client murdered to prevent her from testifying before a grand jury about his scheme for defrauding insurance companies. In 1987, petitioner and two physicians developed the scheme, under which petitioner submitted false medical bills to insurance companies for treatment that supposedly had been given to petitioner's personal-injury clients. The scheme became the subject of a federal criminal investigation in the late 1980s. The investigation led to the return of a 106-count indictment charging petitioner with money laundering, making false declarations to a grand jury, mail fraud, and obstruction of justice. In 1990, petitioner pleaded guilty to those charges and was sentenced to five years' imprisonment. See Pet. App. A2 & n.2.

Earlier, in May 1989, after learning of the grand jury investigation, petitioner coached his former clients to commit perjury before the grand jury. Donna Willard was the one former client who, on March 1, 1990, told petitioner that she would not lie to the grand jury. Petitioner told Willard that if she did not do so he would put "two bullets in her head." Pet. App. A3. On March 6, 1990, Willard died after she was shot twice in the head at point-blank range in her home while her 12-year old son was watching. *Ibid.*; Gov't C.A. Br. 11-13.

2. James Louie pleaded guilty to the murder of Willard and later testified at petitioner's trial, as follows.

Petitioner told Louie that Willard had refused to lie to the grand jury and that he wanted Louie to find someone to murder her. Petitioner gave Louie money to pay the gunman and bullets for the gun. Petitioner emphasized that Willard had to be killed before she was to appear before the grand jury. Louie found the man who would actually pull the trigger, Javier Lebron, through a third man, John Foley. On the night of the murder, Louie and Foley drove Lebron to Willard's home, gave Lebron $1,000 of the money that petitioner had provided, and drove Lebron back to New Jersey after Lebron shot Willard. Pet. App. A3; Gov't C.A. Br. 6, 13-15.

On both direct and cross-examination, Louie said that he concealed petitioner's involvement in the murder from Foley and Lebron. Pet. App. A4; Gov't C.A. Br. 6-7. In his own defense, petitioner sought to introduce two tape-recorded conversations between Foley and Louie in which Louie said that petitioner was not involved in the murder plot. Petitioner argued that the tapes fell within the co-conspirator exception to the hearsay rule in Fed. R. Evid. 801(d)(2)(E) and were also admissible as prior inconsistent statements to impeach Louie. The district court refused to admit the recorded statements. Pet. App. A4.

The court also declined petitioner's request to instruct the jury that evidence of his good character was, standing alone, enough to create a reasonable doubt about his guilt. The court instead charged the jury that "[a]long with all the other evidence that you have heard, you may take into consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime." Pet. App. A11-A12.

3. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A12. It rejected petitioner's contention that Louie's prior statements to Foley were admissible under Rule 801(d)(2)(E).[1] The court explained: "The plain meaning of th[e] language [of the Rule] is that 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy' is admissible against *that* party. Here, Louie was not a co-conspirator of the United States, and therefore his statements could not be offered against the United States in this case." Pet. App. A4-A5.

The court also held that the admission of Louie's prior statements was not required by the Constitution. Pet. App. A5-A7. It distinguished *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), where this Court held that a state evidentiary rule had deprived Chambers of his due process rights by excluding evidence favorable to him. The court of appeals determined in this case that, unlike the prior statements against penal interest at issue in *Chambers*, Louie's prior statements did not bear "persuasive assurances of trustworthiness," and that, in contrast to the defendant in *Chambers*, petitioner had an unrestricted opportunity to cross-examine the witness who had made the prior statements. Pet. App. A6-A7 (internal quotation marks omitted). The court further held that, even if Louie's prior statements should have been admitted, their exclusion was harmless error. *Id.* at A9.

The court of appeals rejected petitioner's challenge to the jury instruction on character evidence, observing

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[1] Rule 801(d)(2)(E) provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

that the same instruction had been approved in *United States* v. *Spangler*, 838 F.2d 85, 86-87 (3d Cir.), cert. denied, 487 U.S. 1224 (1988). Pet. App. A12.[2]

ARGUMENT

1. Petitioner contends that he was deprived of due process and the equal protection of the laws by the district court's refusal to admit the prior statements that Louie made to Foley denying petitioner's involvement in the plot to murder Willard. That contention is without merit.

a. Petitioner first argues that the exclusion of Louie's statements deprived him of due process under this Court's decisions in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Gordon* v. *United States*, 344 U.S. 414 (1953). Pet. 10-25. The court of appeals correctly rejected that argument. Pet. App. A6-A8.

In *Chambers*, a defendant on trial for murder called as a witness McDonald, who had previously confessed to the murder. On direct examination of McDonald, the defendant introduced McDonald's written confession. On cross-examination by the prosecutor, however, McDonald repudiated the confession and gave an alibi for the time of the murder. The trial court refused to allow the defendant to cross-examine McDonald as an adverse witness or to introduce into evidence prior oral state-

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[2] The court of appeals also held that, under the "excited utterance" exception to the hearsay rule, Fed. R. Evid. 803(2), the district court properly admitted the testimony of Willard's coworker that Willard said petitioner threatened to put "two bullets in her head" if she did not lie to the grand jury. Pet. App. A10-A11. Although the petition contains argument concerning that holding (Pet. 27-28), the correctness of that holding is not encompassed within the questions presented (Pet. i) and, in any event, the holding does not warrant further review.

ments by McDonald confessing to the murder. See *Chambers*, 410 U.S. at 291-293.

This Court reversed the defendant's conviction, holding that he did not receive a fair trial. 410 U.S. at 302. The Court began by observing that two "essential" elements of a fair trial are "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf." *Id.* at 294. The Court determined that "[b]oth of these elements * * * [were] implicated" in that case. *Id.* at 295. First, the defendant "was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination." *Ibid.* But the Court found it unnecessary to "decide * * * whether this error alone would occasion reversal," in light of "the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit [the defendant] to call other witnesses" to testify to McDonald's prior statements confessing to the murder. *Id.* at 298. The Court emphasized that the prior statements "bore persuasive assurances of trustworthiness." *Id.* at 302.[3] The Court concluded that "the exclusion [of the prior statements] * * * coupled with the State's refusal to permit [the defendant] to cross-examine McDonald," deprived him of due process. *Ibid.*

The court of appeals correctly concluded in the present case that the exclusion of Louie's prior statements did not conflict with *Chambers*. See Pet. App. A5-

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[3] The Court explained (*Chambers*, 410 U.S. at 300-301):

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case. * * * Third, * * * each confession here was in a very real sense self-incriminatory and unquestionably against interest.

A7. First, unlike the statements against penal interest in *Chambers*, Louie's prior statements to Foley did not bear "persuasive assurances of trustworthiness." 410 U.S. at 302; Pet. App. A7. Louie's prior statements were not corroborated by other evidence at trial, and they were not incriminatory of Louie or otherwise against his interest. See Pet. App. A3-A4. Furthermore, the court of appeals determined that petitioner's opportunity to cross-examine Louie was not restricted "in any comparable way" to that of the defendant in *Chambers*. *Id.* at A7.[4] Thus, petitioner's trial lacked the combination of errors that together led to reversal in *Chambers*.

In *Gordon* v. *United States*, 344 U.S. 414 (1953), the government failed to produce before trial the prior inconsistent statements of a witness named Marshall. On cross-examination, Marshall admitted that between his arrest and his final statement to the police, which implicated defendants in the crime (theft of film), he had given three or four written statements that did not implicate them. *Id.* at 416. The trial court refused to order the production of those statements at trial. *Ibid.* In addition, it refused to allow the defendant during cross-examination of Marshall to elicit the fact that, before Marshall made his final statement to the police inculpating defendants, he had pleaded guilty to

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[4] Because petitioner's cross-examination of Louie was not restricted in any significant way, petitioner's Sixth Amendment argument is without merit. See Pet. 23 n.28, 24, citing *Davis* v. *Alaska*, 415 U.S. 308, 315-318 (1974) (Sixth Amendment violated when trial court, relying on state statute, refused to allow defendant to use juvenile probation status to show bias of government witness), and *Washington* v. *Texas*, 388 U.S. 14, 19-23 (1967) (Sixth Amendment violated by state rule disqualifying alleged accomplices from testifying for criminal defendants).

possession of the stolen film and been admonished by the judge who accepted that plea to tell the probation authorities, before sentencing, everything he knew about the offense, "even though it might involve others." *Id.* at 416-417.

This Court held that the trial court erred in refusing to order the production of Marshall's prior inconsistent statements, *Gordon*, 344 U.S. at 418-419[5]; that it erred in restricting the defendant's cross-examination of Marshall so as to exclude the judge's admonition, *id.* at 421-422; and that "the combination of these two errors was sufficiently prejudicial to require reversal," *id.* at 422. The Court further held that each prior written statement was admissible into evidence, "providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it." *Id.* at 420-421.

Gordon does not support petitioner's constitutional argument, because *Gordon* was not based on the Constitution. Instead, the Court in *Gordon* applied "principles of common law" concerning the admissibility of evidence, 344 U.S. at 418, to conclude that the trial court erred by excluding certain documents, and that the error "prejudiced substantial rights," *id.* at 423. See *Gordon*, 344 U.S. at 418 (case before the Court involved "a limited and definite category of documents to which the holdings of this opinion are likewise confined").

In any event, *Gordon* is distinguishable. Unlike Marshall's prior written statements in *Gordon*, which the Court held were admissible under common law

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[5] Because *Gordon* was decided before enactment of the Jencks Act, 18 U.S.C. 3500, and the Federal Rules of Evidence, the Court relied on "principles of the common law" in holding that the prior written statements should have been produced and admitted into evidence at trial. 344 U.S. at 418.

principles of evidence, Louie's prior statements were not admissible under the subsequently adopted Federal Rules of Evidence (see note 5, *supra*), because they were hearsay that fell outside the co-conspirator exception to the hearsay rule, as both courts below concluded. See Pet. App. A4-A5. In further contrast to Marshall's prior statements, Louie's prior statements were not corroborated by Louie's testimony at trial, but were contradicted by Louie's testimony that those prior statements were false and were made to protect petitioner. *Id.* at A4, A2-A8 & n.3. And petitioner, unlike Gordon, had a full and fair opportunity to cross-examine Louie on his prior statements and his reasons for making them. *Gordon* is therefore of no assistance to him.[6]

b. Petitioner next argues that the exclusion of Louie's prior statements violated equal protection, because it is unfair to allow co-conspirator statements to be admitted against criminal defendants but not against

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[6] The court of appeals in this case did not purport to apply a categorical rule barring "extrinsic evidence" to impeach a witness where the witness admits making a prior statement. See Pet. App. A7-A8. Petitioner is therefore mistaken in contending (Pet. 14) that the decision below "exacerbate[s]" an asserted conflict on that issue. See Pet. 14-17 & n.15. The decision below, however, is consistent with the decisions of other courts of appeals holding that extrinsic proof of a prior inconsistent statement generally is admissible only when the witness on cross-examination denies having made the prior statement. *E.g.*, *BankAtlantic* v. *Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1476 (11th Cir. 1992), cert. denied, 113 S. Ct. 966 (1993); *United States* v. *Devine*, 934 F.2d 1325, 1344-1345 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991); *United States* v. *Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987); *United States* v. *Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); but cf. *United States* v. *Lashmett*, 965 F.2d 179, 182 (7th Cir. 1992) (exclusion of extrinsic evidence was harmless error).

the government. As the court of appeals determined, however, petitioner's equal protection argument "is inapplicable in this case." Pet. App. A7. Louie's prior statements were inadmissible hearsay not because they were offered against the government, but because they were not the statements of a co-conspirator of the party against which they were offered (in this case, the government), as required by Fed. R. Evid. 801(d)(2)(E). See Pet. App. A4-A5 ("Here, Louie was not a co-conspirator of the United States, and therefore his statements could not be offered against the United States in this case."). Thus, this case does not present the question whether the statement of a witness who has conspired with the government could be admitted against the government if it meets the other requirements of Rule 801(d)(2)(E) and, if not, whether that result would offend equal protection principles.[7]

c. In any event, the court of appeals correctly held that, even if it was error to exclude Louie's statements, the error was harmless. Pet. App. A8-A9. As the court of appeals observed, "[d]uring his direct testimony and on cross-examination, Louie admitted numerous times that he had lied to Foley regarding [petitioner's] involvement." *Ibid.* The court of appeals' own examination of the record "convince[d] [it] that Louie was effectively impeached with this evidence." *Id.* at A9. In light of that case-specific determination, the exclusion of Louie's prior statements does not warrant further review.

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[7] The Third Circuit recognized that this question was not before it when it stated: "If Louie had been a coconspirator or agent of the government when he made the statements in question, [petitioner's equal protection] argument would be more apposite. But since Louie held no such status, [petitioner's] argument is misplaced." Pet. App. A7.

2. Petitioner renews his contention that he was entitled to a jury instruction stating that evidence of his good character was, standing alone, enough to create a reasonable doubt precluding conviction. Pet. 25-29. There is some disagreement among the circuits over whether such an instruction is ever required by due process. See *Spangler* v. *United States*, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari). Nonetheless, this Court has declined further review of the issue in two prior cases, *United States* v. *Daily*, 112 S. Ct. 405 (1991); *Spangler* v. *United States*, *supra*, and there is no reason for a different course here. The court of appeals in the present case merely adhered to its prior decision in *Spangler*. See Pet. App. A12. Thus, contrary to petitioner's assertion, the decision below does not "exacerbate[]" the disagreement among the circuits. Pet. 26.

This Court has never held that the jury in a criminal case must be specifically instructed that evidence of the defendant's good character may, standing alone, suffice to create a reasonable doubt precluding a finding of guilt. Some lower courts, however, have suggested that such an instruction is required, at least in certain cases, by *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948). See *Spangler* v. *United States*, 487 U.S. 1224 (1988) (White, J., dissenting). In *Edgington*, the Court recognized that evidence of good character may, alone, give rise to a reasonable doubt, but the Court did not hold that the Constitution requires a specific jury instruction to that effect. See 164 U.S. at 365-366. Although the Court did state in *Michelson* that such an instruction might be required "in a proper case," 335 U.S. at 476, "[t]he passage was dictum. The question before the Court [in *Michelson*] was whether the prosecutor may introduce

specific instances of bad conduct in response to the defendant's character evidence." *United States* v. *Burke*, 781 F.2d 1234, 1241 (7th Cir. 1985).

Assuming that in some cases due process requires a jury instruction specifically stating that good character alone is enough to create reasonable doubt, this is not such a case. Cf. *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (per curiam) (due process does not require jury instruction on presumption of innocence in every case). Petitioner does not and cannot suggest that any of the jury instructions actually given could have led the jury to disregard or undervalue the evidence of petitioner's good character. Cf. *Edgington*, 164 U.S. at 366 (disapproving lower court decisions suggesting that evidence of good character was entitled to less weight than other types of evidence); *Cool* v. *United States*, 409 U.S. 100, 102-104 (1972) (reversing conviction when instruction, in effect, instructed jury to disregard defense testimony unless it "believ[ed] beyond a reasonable doubt that the testimony [was] true"). Indeed, the trial court informed the jury that "[a]long with all the other evidence that you have heard, you may take into consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime." Pet. App. A11-A12. That instruction permitted the jury to find petitioner not guilty based solely on evidence of his good character. The trial court's failure to give a more specific instruction did not deprive petitioner of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1994